1148

No. 3111

United States Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES GYPSUM COMPANY, a Corporation,

Appellant,

vs.

THE MACKEY WALL PLASTER COMPANY, a Corporation,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the District of Montana.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Solicitors of Record.

Messrs. NORRIS & HURD, of Great Falls, Montana,

Messrs. SCOTT, BANCROFT, MARTIN & STEPHENS, of Corn Exchange Bank Bldg., Chicago, Ill.

Solicitors for Defendant and Appellant.

Messrs. COOPER, STEPHENSON & HOOVER, of Great Falls, Montana,

Solicitors for Plaintiff and Appellee. [1*]

In the District Court of the United States in and for the District of Montana.

No. 78—IN EQUITY.

THE MACKEY WALL PLASTER COMPANY,
Plaintiff,

vs.

UNITED STATES GYPSUM COMPANY,
Defendant.

BE IT REMEMBERED that on December 23, 1916, plaintiff filed its Amended Bill of Complaint herein, in the words and figures following, to wit: [2]

*Page-number appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States, District of Montana.

THE MACKEY WALL PLASTER COMPANY, a Corporation,

Plaintiff,

vs.

UNITED STATES GYPSUM COMPANY, a Corporation,

Defendant.

Amended Complaint.

Now comes the above-named plaintiff and for its cause of action against the above-named defendant COMPLAINS AND ALLEGES:

I.

That at all times herein mentioned plaintiff and defendant were and now are corporations, the plaintiff duly organized and existing under and by virtue of the laws of the State of Montana and a citizen of said State with its principal place of business and office at Great Falls, Montana; and the defendant duly organized and existing under and by virtue of the laws of the State of New Jersey and a citizen of the said last-named state and authorized to do and doing business in the State of Montana under and in accordance with the provisions of the laws thereof, but the principal place of business of defendant corporation is to plaintiff unknown. [3]

II.

That heretofore, to wit, on the 15th day of June,

1909, by an instrument in writing dated June 15, 1909, the plaintiff, as party of the first part, and A. D. Mackey and Myra Post Mackey, as parties of the second part, made, executed, acknowledged and delivered to defendant herein a certain lease thereby leasing and letting unto defendant the real and personal property situated in the county of Cascade and State of Montana, particularly described as follows, to wit:

> "All the right, title, interest and estate of said Plaster Company in and to those tracts of land near the town or village of Riceville, in said county, which are described as follows: The southeast quarter of the southwest quarter (SE. ¼ SW. ¼) of Section twenty-four (24); the East half of the Northwest quarter (E. ½ NW. ¼) and the Northeast quarter (NE. ¼) of Section twenty-five (25). Township seventeen (17) North of Range six (6) East of the Montana Principal Meridian; and all the right, title, interest and estate of said Plaster Company in and to the Southwest quarter (SW. ¼) of Section fourteen (14), Township seventeen (17) North of Range six (6) East of the Montana Principal Meridian; the same being all of the rights in and title to said several tracts of land which were acquired by said Plaster Company by and through the conveyance to it of said property by the parties of the second part to this instrument by deed bearing date the 16th day of October, 1908, which is of record in the office of the county clerk and recorder of said

Cascade County, in Book 53 of Deeds on page 332; together with all minerals in or under said lands, all rights, privileges, and easements incident or appurtenant thereto, and especially all rights acquired by said Plaster Company in or concerning the use of land adjacent to said tracts of land hereinbefore decribed, under and by virtue of the written instrument duly entered into by and between Villa Clara Albright and William H. Albright, her husband, as parties of the first part and the said Plaster Company as party of the second part thereto, on the 15th day of June, 1909, as well as all rights, privileges, easements and rights of way granted to said Plaster Company by J. Walter Rice, David Rice and Mary Rice, wife of said David Rice, in and over certain other land, in the vicinity of said tracts herein and hereby leased by their written instrument duly entered into with said Plaster Company on the 14th day of June, 1909.

"All of the right, title, interest and estate of the said Plaster Company in and to that certain tract of land in or near the City of Great Falls, in said County of Cascade, which is described as follows: Beginning [4] at a point fifty (50) feet northwesterly from and at right angles to the center line of the B. M. Smelter Branch as measured from a point in the said center line 790 feet Northeasterly from its intersection with the south line of Section two (2) Township twenty (20) North of Range three (3) East; thence Northeasterly parallel to the said center

line 195 feet; thence North along the East boundary line of the right of way of the Great Northern Railway Company's line of railroad 220 feet; thence West at right angles 200 feet; to the West boundary line of the said right of way; thence Southerly along said boundary line 370 feet; thence Easterly in a straight line 175 feet, to the place of beginning, being all of the rights in and title to said tract of land which were acquired by said Plaster Company by and through the Indenture of Lease therefor which was duly entered into between the Great Northern Railway Company and said Plaster Company on the 22d day of June, 1908, and subject to all of the terms and conditions therein set forth, a true copy of which said indenture of lease is hereunto attached as part of this instrument and marked 'Exhibit Plant Lease.' "

"And the Plaster Company leases the real estate and mining property situated near said Village of Riceville with all of the rights and privileges incident or appurtenant to it as aforesaid, and subleases said real estate situated in or near said city of Great Falls, subject to the terms and conditions of the original lease to it as aforesaid; together with all buildings and other improvements upon said mining property near Riceville, and all buildings owned by said Plaster Company upon any land adjacent thereto, and also all buildings and other improvements upon said leased land in or near the city of Great Falls including the manufacturing

plant and storehouse structures thereon, and also all apparatus, machinery, tools, office furniture, fixtures, implements, and other property of every kind which is owned by said Plaster Company and is customarily used, or is useful in the operation of said mine and mining property near Riceville, or the conducting and managing of said manufacturing plant in or near the City of Great Falls."

for a period of one year from and after July 5, 1908. And by and in said instrument granted unto the defendant the right to renew said lease for a further period of five years after July 5, 1910.

And the said plaintiff, by and in said instrument dated June 15, 1909, granted to defendant the irrevocable right and option to purchase of plaintiff, at any time before the expiration of said one year term, or if said [5] one year term should be renewed or extended for said five year term then at or before the expiration of said five year term, all the property and property rights described in said lease, for the sum of Fifty Thousand Dollars, payable as follows: Fifteen Thousand Dollars in cash at the same time with the execution and delivery of the conveyance of said property and property rights by the plaintiff; and the balance of Thirty-five Thousand Dollars in seven promissory notes of said defendant to be executed and delivered by said defendant to the said plaintiff at the time of the making of said cash payment; each of said notes to bear date the day on which said cash payment should be made and to be for the principal sum of Five Thousand Dollars pay-

able to the order of said plaintiff, one payable in three months and the other respectively in six, nine, twelve, fifteen, eighteen and twenty-one months after the date thereof with interest thereon at the rate of five per cent per annum from the date thereof until paid.

And it was agreed that simultaneously with the making of said cash payment and the execution and delivery of said notes, as in said instrument provided, the plaintiff should sell to the defendant and convey to it all of the said property and property rights of said plaintiff by a good and sufficient warranty deed then to be executed and delivered by said plaintiff to defendant covenanting therein especially that previous to the time of the execution of said warranty deed the said plaintiff had not conveyed any estate or interest in said property or created therein any property rights in favor of any person other than the defendant, and that said property rights should be at the time [6] of the execution and delivery of said deed free from encumbrances done, made or suffered by or through the act of said plaintiff or any person claiming under it. And further covenanting that said defendant should enjoy said property and property rights without any lawful disturbance by any person or persons whomsoever.

III.

And at the same time and in the same instrument the above-mentioned A. D. Mackey and Myra Post Mackey, as owners and holders of all of the capital stock of plaintiff, gave and granted to defendant irrevocably the right, privilege and option at any time

during said one year or during said five-year term, if defendant should not have elected to purchase said property and property rights, to purchase of them and each of them all of the issued shares of the capital stock of the plaintiff for the sum of fifty thousand dollars, payable at the same time and in the same manner as hereinbefore set forth for payment of the purchase price for said property and property rights, save and except that in the event that defendant should elect to purchase said shares from said shareholders and not said property and property rights from said plaintiff, then and in that event the said cash payment should be made to the said shareholders A. D. Mackey and Myra Post Mackey at the time of the delivery of the certificates for such stock and the said notes should be delivered to and be payable to the order of said shareholders. And the said shareholders then and there agreed in said instrument that at the time of the making of said cash payment and the execution and delivery [7] of said notes as in said instrument provided, the said shareholders would deliver to said defendant the certificates of stock representing all of the issued shares of said plaintiff duly endorsed to said defendant, and effectual to transfer the same to the said defendant on the books of the said plaintiff.

IV.

That defendant took possession of the property so leased to it under and in accordance with the terms of said lease, and enjoyed the use thereof during the life thereof; which said lease and agreement plaintiff will produce and proceed in accordance with the

law and the rules of this Honorable Court in such case made and provided, all of which said provisions will more fully appear when and as said lease and agreement shall be produced and proven. And plaintiff, for further certainty as to the terms and conditions of said lease and agreement, prays leave to refer thereto.

V.

That thereafter, and on, to wit, July 1, 1910, plaintiff and said A. D. Mackey and Myra Post Mackey and defendant entered into a further agreement, dated July 1, 1910, in writing and whereby the said lease and agreement, hereinbefore referred to, dated June 15, 1909, was renewed and extended for a further period of five years from and after July 5, 1910; which last-named agreement confirmed all of the rights and privileges set forth and contained in said instrument, and in said agreement dated June 15, 1909. And the said last-named agreement was made a part and parcel by reference to the said agreement dated July 1, 1910; a [8] copy of which last-named agreement is hereto annexed, and made a part hereof and marked Exhibit "A" to which reference is hereby made.

VI.

That defendant continued to occupy and use the above-described premises and property under the terms and conditions of the instruments hereinbefore referred to until July 5, 1915, when defendant applied to plaintiff and requested a further extension of said several agreements, to which extension plaintiff gave its consent. And thereafter on July 6, 1915,

plaintiff and said A. D. Mackey and Myra Post Mackey and defendant, in order to make effective said agreement for said further extension, entered into an agreement in writing dated July 6, 1915, a copy of which is hereto annexed, made a part hereof, and marked Exhibit "B," to which for greater certainty as to its terms and conditions plaintiffs beg leave to refer.

VII.

And thereafter, at the request of defendant, plaintiff made a further modification of the last-named agreement dated July 14, 1915, a copy of which is hereto annexed, made a part hereof and marked Exhibit "C," to which plaintiff begs leave to refer.

VIII.

That as a part of the consideration for the making of said last-named agreement dated July 6, 1915, it was agreed that if defendant should determine that it would not avail itself of the option to purchase the property of the said plaintiff in the agreements of June 15, 1909, and July 1, 1910, contained, upon the terms and conditions of said agreements, [9] defendant would at least sixty (60) days prior to the 1st day of July, 1916, give the plaintiff herein a notice in writing to the effect that defendant would not purchase said property under and by virtue of said agreements. And it was further agreed that if defendant herein should neglect or fail to give such notice at least sixty days before July 1, 1916, it would thereby become obligated to make said purchase and pay the consideration in said instruments dated June 15, 1909, and July 1, 1910, provided to be paid in

the event of the purchase of said property, upon the terms and conditions and in like manner as is set forth in said several agreements.

IX.

That defendant did not give plaintiff or the said A. D. Mackey or Myra Post Mackey any notice in writing at least sixty days before the 1st day of July, 1916, or at any other time in accordance with the terms and provisions of said agreement dated July 6, 1915, or otherwise, that defendant did not intend to purchase said property under its said option. And thereby plaintiff avers defendant did elect to purchase said property above described and the whole thereof, and became obligated to pay for the same in manner and form as in said agreements provided.

X.

That after defendant had made its election to purchase the property of the said plaintiff described in said instruments dated June 15, 1909, and July 1, 1910, as aforesaid, in manner and form as aforesaid, plaintiff on the 5th day of July, 1916, made and acknowledged a good and sufficient [10] deed of general warranty and containing all of the specific warranties specified in said instruments dated June 15, 1909, and July 1, 1910, as aforesaid, and further covenanting that plaintiff would make any other or further conveyance that should or might be necessary or desirable on the part of the defendant and delivered and tendered said instrument to defendant.

XI.

Plaintiff further alleges that on July 5, 1916, the said A. D. Mackey and Myra Post Mackey as owners and holders of all of the issued capital stock of plaintiff made and acknowledged an instrument in writing sufficient to grant and convey to defendant all of their shares of stock in plaintiff, to wit, five hundred and fifteen shares and accompanying said instrument and annexed thereto were the certificates of stock representing all of the issued shares of said plaintiff and all said certificates were duly endorsed to the defendant so as to enable defendant to have the same transferred upon the books of said plaintiff. And plaintiff, at the same time, to wit, on July 6, 1916, being authorized so to do by said A. D. Mackey and Myra Post Mackey, tendered to defendant said instrument in writing assigning and conveying and confirming said shares of stock to defendant. And plaintiff then and there demanded of defendant that defendant pay to plaintiff the purchase price aforesaid of said property so as aforesaid elected by defendant to be purchased by it, to wit, fifty thousand dollars, fifteen thousand dollars thereof to be paid in cash and the remaining thirty-five thousand dollars to be paid by the notes of defendant [11] and demanded that defendant execute and deliver to plaintiff the said notes of defendant for the said remainder of said purchase price of said property and property rights payable at the times and in the manner provided in said agreement dated June 15, 1909, and July 1, 1910. And plaintiff avers that it offered to deduct from the cash payment

above mentioned any sum or sums which might then be due and owing to defendant by said A. D. Mackey and Myra Post Mackey.

XIII.

That defendant wholly refused to accept said deed or said shares of stock or said instrument in writing assigning said shares of stock to defendant, and wholly refused and still refuses to carry out and perform the terms and conditions of said agreements, dated June 15, 1909, and July 1, 1910, notwithstanding its election to purchase said property in manner and form as aforesaid. And said defendant is attempting and undertaking to repudiate its said election to purchase said property.

XIV.

Plaintiff further alleges that a large portion of the property which defendant has obligated itself to purchase in manner and form as aforesaid from plaintiff, consists of mining property, to wit, Gypsum contained in the mines in said several instruments described, and the extent of the gypsum deposits therein are unknown, by reason whereof it would be impossible to estimate with reasonable certainty the damages which plaintiff will suffer as a result of the defendant's refusal to carry out and perform its contract to purchase. And plaintiff has no plain, speedy or adequate remedy at law in the premises and no remedy **[12]** save by and through the interposition of this Honorable Court as a court of equity to compel defendant to specifically perform its said contract and make said purchase. And plaintiff avers that it is ready and willing and has

ever been ready and willing to make any other or further conveyances or instrument that shall or may be necessary to invest defendant with the full and absolute and unencumbered title to all of the property which defendant agreed to purchase as aforesaid. And plaintiff is ready and willing to do all and every act which equitably it ought to do *it* it has not already done all that equity would require of it in the premises.

WHEREFORE plaintiff prays that defendant be required to pay in cash to plaintiff the sum of fifteen thousand dollars.

That defendant make and deliver to plaintiff its seven promissory notes of five thousand dollars each, payable at the times and in the manner stipulated in said contract, with interest at five per cent per annum, and that said notes be dated July 6, 1916.

And plaintiff here brings and deposits in this court the deed so as aforesaid made, acknowledged and tendered to defendant and the instrument so as aforesaid tendered to defendant assigning to defendant all of the capital stock of the said plaintiff, and the certificates of stock representing said shares of stock of plaintiff.

And that defendant be required to accept and receive said instruments and to specifically perform its said contract; **[13]**

And that plaintiff have such other and further relief in the premises as shall be agreeable to equity

and good conscience, and as plaintiff shall be found entitled.

COOPER, STEPHENSON & HOOVER,
RANSOM COOPER,
W. H. HOOVER,
Attorneys for Plaintiff.

State of Montana,
County of Cascade,—ss.

Ransom Cooper, being first duly sworn, deposes and says that he is one of the attorneys for the plaintiff named in the foregoing amended complaint, and is well acquainted personally with the facts therein stated; that he has read said complaint and knows the contents thereof and that the same is true except as to the matters therein stated upon information and belief, and as to those he believes it to be true.

RANSOM COOPER.

Subscribed and sworn to before me this 21st day of December, A. D. 1916.

[N. S.] W. H. HOOVER,
Notary Public for the State of Montana, Residing at Great Falls, in said County.
My commission expires February 2, 1917. **[14]**

Exhibit "A" to Amended Complaint.

THIS AGREEMENT made this 1st day of July, A. D. 1910, by and between THE MACKEY WALL PLASTER COMPANY, a Montana corporation, party of the first part, hereinafter designated the Plaster Company, A. D. MACKEY and MYRA POST MACKEY of the City of Great Falls, County

of Cascade, and state of Montana, parties of the second part and the UNITED STATES GYPSUM COMPANY, a New Jersey corporation, party of the third part, and hereinafter designated the Gypsum Company, WITNESSETH, that

WHEREAS, the parties hereto did heretofore and on the 15th day of June, 1909, enter into a certain written agreement, under seal, under and by virtue of the terms of which said agreement the Plaster Company demised and leased to the Gypsum Company, for a term of one year from the 5th day of July, 1909, to the 5th day of July, 1910, all the right, title, interest and estate of the Plaster Company, in and to certain lands, hereinafter described, which said instrument was filed for record in the office of the county clerk and recorder in and for the county of Cascade and State of Montana on the 20th day of July, A. D. 1909, at three o'clock P. M. of said day, and was duly recorded in Book one of leases at page 267, and

WHEREAS it is provided in said agreement that the Gypsum Company shall have the right and privilege to extend and renew said lease for a term of five years from the date of the expiration of the term mentioned therein upon the same conditions, and with the same reserved yearly rental as therein provided, and the Gypsum Company has elected to accept an extension and a renewal of said lease, and the parties hereto have agreed to such extension and renewal together with certain modifications of the terms of said lease.

NOW, THEREFORE, in consideration of the mutual covenants and promises hereinafter contained, the parties have agreed as follows:

FIRST. The Plaster Company in consideration of the sum of FIFTEEN THOUSAND ($15,000.00) DOLLARS to be paid by the Gypsum Company, as hereinafter provided, does hereby demise and lease to the Gypsum Company, for and during the term of five years, commencing on the 5th day of July, 1910, and ending on the 5th day of July 1915, the following described real estate and mining property situated in the county of Cascade and State of Montana, to wit:

A. All the right, title, interest and estate of said Plaster Company in and to those tracts of land near the town or village of Riceville in said county, which are described as follows:

The Southeast quarter of the Southwest quarter (SE. ¼ SW. ¼) of Section twenty-four (24); the East half of the Northwest quarter (E. ½ NW. ¼) and the Northeast quarter (NE. ¼) of Section twenty-five (25), Township seventeen (17) North of Range six (6) East of the Montana Principal Meridian; and all the right, title, interest and estate of said Plaster Company in and to the Southwest quarter (SW. ¼) of Section fourteen (14), township seventeen (17) North of Range six (6) east of the Montana principal meridian, the same being all of the rights in and title to said several tracts of land which were acquired by said Plaster Company by and through the conveyance to it of said property by the parties of the second part to this instrument

by deed bearing date the 16th day of October, 1908, which is of record in the office of the county clerk [15] and recorder of said Cascade County in Book 53 of Deeds on Page 332. TOGETHER with all minerals in or under said land, all rights privileges, and easements incident or appurtenant thereto, and especially all rights acquired by said Plaster Company in or concerning the use of land adjacent to said tracts of land hereinbefore described, under and by virtue of the written instrument duly entered into by and between Villa Clara Albright and William H. Albright, her husband, as parties of the first part, and the said Plaster Company as party of the second part thereto, on the 15th day of June, 1909, as well as all rights privileges, easements, and rights of way, granted in said Plaster Company by J. Walter Rice, David Rice and Mary Rice, wife of said David Rice, in and over certain other land in the vicinity of said tracts herein and hereby leased, by their written instrument duly entered into with said Plaster Company on the 4th day of June, 1909.

b. All of the right, title, interest, and estate of the said Plaster Company in and to that certain tract of land in or near the City of Great Falls, in said County of Cascade, which is described as follows:

Beginning at a point fifty (50) feet northwesterly from and at right angles to the center line of the B. & M. Smelter branch as measured from a point in the said center line Seven Hundred and ninety (790) feet northeasterly from its intersection with the south line of Section two (2) Township twenty

(20) North of Range three (3) East; thence northeasterly parallel to the said center line one hundred and ninety-five (195) feet; thence north along the east boundary line of the right of way of the Great Northern Railway Company's line of railroad two hundred and twenty (220) feet; thence West at right angles two hundred (200) feet to the west boundary line of the said right of way; thence southerly along said boundary line three hundred and seventy (370) feet thence easterly in a straight line one hundred and seventy-five (175) feet to the place of beginning; being all of the rights in and title to said tract of land which were acquired by said Plaster Company by and through the indenture of lease therefor which was duly entered into between the Great Northern Railway Company and said Plaster Company on the 22nd day of June, 1908, and subject to all of the terms and conditions therein set forth a true copy of which said Indenture of Lease is hereunto attached to said agreement of June 15, 1909, to which reference is hereby made and by reference thereto, is made a part of this instrument.

And the Plaster Company leases the said real estate and mining property situated near said village of Riceville, with all the rights and privileges incident or appurtenant to it, as aforesaid, and subleases said real estate situated in or near said City of Great Falls, subject to the terms and conditions of the original lease to it as aforesaid, together with all buildings and other improvements upon said mining property near Riceville, and all buildings owned by said Plaster Company upon any

land adjacent thereto, and also all buildings and other improvements upon said leased land, in or near the city of Great Falls, including the manufacturing plant and storehouse structures thereon, and also all apparatus, machinery, tools, office furniture, fixtures, implements and other property of every kind which is owned by the Plaster Company, and is customarily used, or is useful in the operation of said mine and mining property near Riceville, or the conducting and managing of said manufacturing plant, in or near the city of Great Falls. **[16]**

SECOND. The Gypsum Company does hereby accept said lease and agree to pay to the Plaster Company, the sum of FIFTEEN THOUSAND ($15,000) DOLLARS, as rent for said demised premises, payable as follows: the sum of THREE THOUSAND ($3,000) DOLLARS on the 5th day of July 1910, as rent, to the 5th day of July, 1911, and the further sum of THREE THOUSAND ($3,000) DOLLARS on the 5th day of July of each and every year thereafter, during the term hereby created, the sum being annual rent, at the rate of THREE THOUSAND ($3,000) DOLLARS per annum, payable annually in advance.

THIRD. This term is granted upon the same conditions, covenants, and agreements contained in said written agreement of June 15, 1909, demising and leasing to the Gypsum Company said above described premises, for a term of one year from the 5th day of July, 1909 to the 5th day of July 1910, and all of the conditions, obligations, and covenants, and agreements contained in said written agreement,

are hereby made a part of this instrument, by reference thereto, and with the same force and effect as if each and all of the conditions, covenants, and agreements contained in said written agreement were expressed in writing herein, except such as are inconsistent with the terms of this instrument.

It being understood that all of the rights and privileges granted and given to the Gypsum Company in and by said written agreement of June 15th, 1909, by the Plaster Company, and said Second Parties or any or either of them are hereby extended and renewed for a term of five years, and are given and granted to the Gypsum Company to be used, enjoyed and exercised during the term of this lease, as if the same were expressed in writing herein, except such as are inconsistent with the terms of this instrument.

FOURTH. The Gypsum Company shall have the right or privilege at its election to terminate the term herein granted at the expiration of any year of said term by giving to the Plaster Company thirty days written notice of the intention of the Gypsum Company to terminate said term, said notice to be given at any time within thirty days prior to the expiration of any year of said term,—that upon giving such notice, and at the expiration of the year during which said notice shall be given, in accordance with the terms hereof, the term herein granted shall and, all the obligations and agreements of the Gypsum Company hereunder shall cease.

IN EXECUTION WHEREOF, in duplicate, each of the corporate parties hereto has caused these presents to be signed in its behalf by its President, and its corporate seal to be hereunto affixed duly attested by the signature of its secretary, and the parties of the second part have hereunto set their hands and seals the day and year first above written.

THE MACKEY WALL PLASTER COMPANY.

By A. D. MACKEY,

President.

A. D. MACKEY. (Seal)

MYRA POST MACKEY. (Seal)

Attest: RANSOM COOPER,

Secretary.

UNITED STATES GYPSUM COMPANY.

By S. L. AVERY,

President.

Attest: [17]

State of Minnesota,

County of Hennepin,—ss.

On this 14th day of July, A. D. 1910, before me, Caroline Beede, a notary public in and for the county of Hennepin and State of Minnesota, personally appeared A. D. Mackey, known to me to be the president of The Mackey Wall Plaster Company, one of the corporations that executed the within instrument, and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year

in this certificate first above written.

CAROLINE BEEDE,

Notary Public in and for the County of Hennepin and State of Minnesota, Residing at Minneapolis.

My commission expires on the 25th day of Sept. 1915.

State of Minnesota,
County of Hennepin,—ss.

On this 14th day of July, A. D. 1910, before me, Caroline Beede, a notary public in and for the county of Hennepin, and State of Minnesota, personally appeared A. D. Mackey and Myra Post Mackey, his wife, known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

CAROLINE BEEDE,

Notary Public in and for the County of Hennepin and State of Minnesota, Residing at Minneapolis.

My commission expires on the 25th day of Sept., 1915.

State of Illinois,
County of Cook,—ss.

On this 2d day of July, A. D. 1910, before me, Stanley S. Jenkins, a notary public in and for the county of Cook and State of Illinois, personally appeared S. L. Avery, known to me to be the president of the

United States Gypsum Company, one of the corporations that executed the within instrument, and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

STANLEY S. JENKINS,

Notary Public of the State of Illinois, in and for the County of Cook.

My commission expires on the 20th day of March, 1911. [18]

Exhibit "B" to Amended Complaint.

THIS AGREEMENT made this 6th day of July, A. D. 1915, by and between MACKEY WALL PLASTER COMPANY, a corporation, party of first part, and A. D. MACKEY and MYRA POST MACKEY, parties of the second part, hereinafter called the Lessors, and the UNITED STATES GYPSUM COMPANY, a corporation organized under the laws of the State of New Jersey and authorized to do and doing business in the state of Montana under and by virtue of the laws thereof, party of the third part, hereinafter called the Lessee,

WITNESSETH:

WHEREAS, on the 15th day of June, A. D. 1909, the parties hereto made a certain agreement wherein and whereby the Lessors let and leased certain property therein described to the Lessee, and granted to the Lessee certain options and privileges in said instrument fully set forth; and

WHEREAS, thereafter by an instrument in writing dated the first day of July, 1910, the parties by an instrument in writing extended the said instrument dated June 15, 1909, together with all of the rights, privileges and immunities therein set forth until and including this date; and

WHEREAS, the Lessee has requested Lessors to grant a further extension of said lease and options contained in said agreements dated June 15, 1909, and July 1, 1910, and in order to induce said extension, has offered to pay the same rents provided in said instruments, to be paid to Lessors for the privileges therein contained, for and during the period of one year from and after the date hereof, and Lessors have consented to make said renewal;

NOW, THEREFORE, in consideration of the premises and of the rental aforesaid and of the further sum of ONE DOLLAR, to Lessors paid by Lessee, the receipt of which is hereby acknowledged, it *i*s agreed that the said instruments dated June 15, 1909, and July 1, 1910, be in all things and respects extended, renewed and made valid and of full force and effect for the further period of one year from and after the date hereof. And as a further consideration for said extension, Lessee agrees that if it shall determine that it will not avail itself of the option in said several agreements contained to purchase the property of the Lessor Mackey Wall Plaster Company upon the terms and conditions in said several instruments provided, it will, at least sixty days prior to the first day of July, 1916, give the Lessors in writing a notice to the effect that Lessee

will not purchase the said property under and by virtue of said agreements; and it is agreed that if Lessee shall neglect or fail to give such notice at least sixty days before the first day of July, 1916, it will thereby become obligated to make such purchase and pay the consideration in said instruments provided to be paid in the event of purchase, upon the terms and conditions and in like manner as is set forth in several agreements, save and except as to the time for the making of the first payment in said agreements provided; in all other ways and respects the said agreements shall be and remain in full force and virtue, the same to all intents and purposes as they would if herein set forth at large and confirmed word for word.

IN TESTIMONY WHEREOF, the corporate parties hereto have caused their corporate names to be hereunto signed by their respective executive officers, in that behalf duly authorized, and their corporate seals affixed, and the individual lessors have hereunto set their hands and seals the days and year first above written. [19]

THE MACKEY WALL PLASTER COMPANY.
By A. D. MACKEY,
President.

Attest: RANSOM COOPER,
Secretary.

MYRA POST MACKEY,

A. D. MACKEY,

UNITED STATES GYPSUM CO.
By S. L. AVERY,
Pres.

Attest:

State of Illinois,
County of Cook,—ss.

On this 14th day of July, A. D. 1915, before me, A. J. Casion, a notary public for the State of Illinois, personally appeared S. L. Avery, known to me to be the president of the United States Gypsum Company, one of the corporations that executed the within instrument, and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

A. J. CASION,
Notary Public for the State of Illinois, Residing at Chicago, in said County.

My commission expires July 7th, 1918.

State of Minnesota,
County of Hennepin,—ss.

On the 12th day of July, A. D. 1915, before me, Carolin Beede, a notary public for the State of Minnesota, personally appeared A. D. Mackey and Myra Post Mackey, his wife, known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] CAROLINE BEEDE,
Notary Public for the State of Minnesota, Residing at Minneapolis, in said County.

My commission expires Sept. 25, 1915.

State of Montana,
County of Cascade,—ss.

On this 6th day of July, A. D. 1915, before me, W. H. Hoover, a notary public for the State of Montana, personally appeared A. D. Mackey, known to me to be the president of the Mackey Wall Plaster Company, one of the corporations that executed the within instrument, and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] W. H. HOOVER,
Notary Public for the State of Montana, Residing at Great Falls, in said County.
My commission expires Feb. *a,* 1917. [20]

Exhibit "C" to Amended Complaint.

July 14, 1915.

United States Gypsum Company,
205 West Monroe Street,
Chicago, Illinois.

Dear Sirs:

We consider the terms of the supplemental contract made by us with your company on July 6, 1915, as clear and unambiguous, but in order that there may be no question whatsoever as to the terms thereof, we are writing you our construction of the same.

The lease and option given to you by us, as contained in the agreements of June 15, 1909, and July

1, 1910, are in all things and respects extended and renewed and continued in full force for a term of one year from July 6, 1915.

The only change therein is that in case you fail to notify us of your election not to purchase on or before sixty days prior to the first day of July, 1916, then you shall be held to have elected to exercise the option of purchase contained in said contracts, and we shall thereupon become obligated to convey to you, in manner as set forth in said contract of June 15, 1909, all of the properties, chattels, leases, rights and interest described in paragraphs "Second" and "Third" of said last-mentioned contract, together with any and all other properties, chattels, leases, rights and interests mentioned in the contracts of June 15, 1909, and July 1, 1910, above mentioned. And upon such conveyance being made by us, then you are to pay us the consideration mentioned in said contracts at the times and in the manner therein stated, the first payment of fifteen thousand dollars ($15,000) to be made upon the execution and delivery by us of the conveyances above mentioned.

The notice to be given under said contract of July 6, 1915, shall be sufficient, if deposited in the United States mails, postage prepaid, and enclosed in an envelope addressed to either of us at the city of Great Falls, County of Cascade, State of Montana.

Yours very truly.

Service of the within amended complaint is hereby admitted this 22d day of December, A. D. 1916.

NORRIS & HURD,
Attorneys for Defendant.

Filed Dec. 23, 1916. Geo. W. Sproule, Clerk. [21]

Thereafter, on January 20th, 1917, answer to amended complaint was duly filed herein, in the words and figures following, to wit: [22]

United States of America,
District of Montana,—ss.

In the District Court of the United States, District of Montana.

THE MACKEY WALL PLASTER COMPANY, a Corporation,

Plaintiff,

vs.

UNITED STATES GYPSUM COMPANY, a Corporation,

Defendant.

Answer of Defendant to Amended Complaint.

This defendant, now and at all times hereafter, saving to itself all manner of benefit and advantage of exception which can or may be had or taken to the errors, uncertainties and other imperfections in said amended complaint contained, for answer thereunto, or to so much and such parts thereof as this defendant is advised it is material or necessary for it to make answer unto, answering says:

I.

The defendant admits the allegations contained in paragraph I of said amended complaint.

II.

This defendant denies that on the 15th day of

June, 1909, the plaintiff, The Mackey Wall Plaster Company, and A. D. Mackey and Myra Post Mackey, leased to this defendant the real and personal property situated in the county of Cascade and State of Montana, described in paragraph II of the amended complaint filed by plaintiff herein, but this defendant [23] admits that on or about June 15, 1909, a written instrument was executed, acknowledged and delivered, wherein the said Mackey Wall Plaster Company was named as party of the first part and the said A. D. Mackey and Myra Post Mackey were named as parties of the second part and the United States Gypsum Company was named as party of the third part, a copy of which said written instrument is hereto annexed marked Exhibit "A" and made a part hereof; and this defendant admits that under and by virtue of the terms and agreements contained in said written instrument the plaintiff leased to this defendant the real and personal property situated in the county of Cascade and State of Montana and described in said paragraph II of said amended complaint, which said real and personal property is more particularly described and set forth in said written instrument in paragraph "Second" thereof.

This defendant further answering says that in addition to the real and personal property described in paragraph II of said amended complaint the said plaintiff, The Mackey Wall Plaster Company, by said instrument in writing leased to this defendant:

> The right to exercise, use and enjoy during the term thereby created all the rights and privileges which were reserved to A. D. Mackey and Myra

Post Mackey in the deed from them to Thor A. Weggeland, bearing date the 1st day of October, 1908, and of record in the office of the County Clerk and Recorder of Cascade County, in Book 53 of Records, at page 525, and which said rights, privileges and easements were subsequently conveyed by the said A. D. Mackey and Myra Post Mackey to the said Mackey Wall Plaster Company, with the right and privilege to the said United States Gypsum Company to extract gypsum and other minerals from the mining property at or near Riceville, and to use and consume the same in the manufacture of plaster or for any other uses or purposes, as fully and in all respects as might have been done by the said Plaster Company prior to the making of said lease of June 15, 1909, and as fully and in all respects as might have been done [24] by the said A. D. Mackey and Myra Post Mackey prior to the conveyance of said reserved rights, powers, privileges and estate by them to the said Plaster Company; including the right to make new openings in said mining premises and to prospect for and dig, open up and operate new mines therein or thereon;

it being provided in said instrument of June 15, 1909, that such gypsum and other minerals when so mined, extracted or removed from said last mentioned premises were to be and remain the property of the said United States Gypsum Company as fully in all respects without further or other consideration or payment therefor as it ever has been, or could have be-

come, owned by said Plaster Company or by the said A. D. Mackey and Myra Post Mackey, its predecessors in title to said last-mentioned property; which said last-mentioned property is more fully described in paragraph "Third" of said instrument of June 15, 1909.

This defendant further answering admits that the said premises and all of them so leased to it as aforesaid by the said Mackey Wall Plaster Company were leased for the period of one year from and after July 5, 1909, with the right or privilege of this defendant to renew said lease for a further period of five years after July 5, 1910, which said right or privilege to so renew the said lease is more fully set forth in paragraph "Fourth" of said instrument of June 15, 1909.

This defendant further answering admits that the plaintiff in and by said instrument of June 15, 1909, gave and granted to this defendant irrevocably the right and option to purchase of said Plaster Company at any time before the expiration of said one year term, or if said one year term were renewed or extended for said five year term, then at any time before the expiration of said five year term, all the property and rights described in said lease for the sum of Fifty Thousand Dollars ($50,000.00), payable as [25] follows:

> Fifteen Thousand Dollars ($15,000.00) in cash at the same time with the execution and delivery of the conveyance of said property and property rights by said Plaster Company, and the balance of Thirty-five Thousand Dollars

($35,000.00) in seven (7) promissory notes of this defendant to be executed and delivered by this defendant to the said Plaster Company at the time of the making of said cash payment, each of said notes to bear date the day on which said cash payment should be made and to be for the principal sum of Five Thousand Dollars ($5,000.00), payable to the order of said Plaster Company, one three (3) months, and the others, respectively, six (6), nine (9), twelve (12), fifteen (15), eighteen (18), and twenty-one (21) months, after the date thereof, with interest thereon at the rate of five per cent (5%) per annum from the date thereof until paid;

which said right and option so given by the said Mackey Wall Plaster Company to this defendant is more particularly set forth in paragraphs "Thirteenth," "Fourteenth," "Fifteenth" and "Sixteenth" of said instrument of June 15, 1909.

This defendant admits that it was provided in said instrument of June 15, 1909, that simultaneously with the making of said cash payment and the execution and delivery of said notes, as hereinabove set forth, the said Plaster Company would sell to this defendant and convey to it all the said property and property rights of the said Plaster Company by a good and sufficient warranty deed then to be executed and delivered by the said Plaster Company to this defendant covenanting therein especially that previous to the time of the execution of the said warranty deed the [26] said Plaster Company had not conveyed any estate or interest in said property

or created therein any property rights in favor of any person other than this defendant; that said property and property rights should be at the time of the execution and delivery of said deed free from encumbrance done, made or suffered by or through the act of the said Plaster Company, or any person claiming under it, and that this defendant would enjoy said property and property rights without any lawful disturbance by any person or persons whomsoever.

III.

This defendant admits that at the same time and in the same instrument, A. D. Mackey and Myra Post Mackey, described in said instrument of June 15, 1909, as said Plaster Company shareholders, gave and granted to this defendant irrevocably the right, privilege and option at any time during said one year, or during said five-year term, if this defendant should not have elected to purchase said property and property rights, to purchase of them and each of them all of the issued shares of the capital stock of the said Mackey Wall Plaster Company for the sum of Fifty Thousand Dollars ($50,000.00), payable at the same time and in the same manner as in said instrument set forth, for the payment of the purchase price for said property and property rights, save and except that in the event this defendant should elect to purchase said shares from said shareholders and not said property and property rights from said Plaster Company, then and in that event the said cash payment should be made to the said shareholders at the time of the delivery of the certificates for such stock

[27] and the said notes should be delivered to, and be payable to, the said shareholders, and that the said shareholders would at the time of the making of said cash payment and the execution and delivery of said notes, deliver to this defendant the certificates of stock representing all the issued shares of said plaintiff, The Mackey Wall Plaster Company, in form effectual to transfer the same to this defendant on the books of the said Mackey Wall Plaster Company; but this defendant further answering says that it never at any time exercised the option to purchase said shares of the capital stock of the said Mackey Wall Plaster Company, nor have the said A. D. Mackey and Myra Post Mackey at any time claimed that this defendant had exercised said last mentioned option, and this defendant says that all the allegations contained in said paragraph III of said amended complaint are irrelevant and impertinent and improperly inserted in said amended complaint.

IV.

This defendant admits that it took possession of the property so leased to it as aforesaid, and enjoyed the use thereof during the term of said lease; and further answering says that it paid all the rents and did all the things required by it to be done in accordance with the terms thereof.

V.

This defendant admits that thereafter and on, to wit, July 1, 1910 it entered into a further agreement in writing, a copy of which is annexed to the said amended complaint and marked Exhibit "A"; and

further answering says that under and by virtue of the terms of the said last mentioned [28] agreement the said Mackey Wall Plaster Company leased to this defendant, for and during the term of five years commencing on the 5th day of July, 1910, and ending on the 5th day of July, 1915, all of the property, real and personal, described in said first mentioned agreement of June 15, 1909, for the sum of Fifteen Thousand Dollars ($15,000.00), payable to the said Mackey Wall Plaster Company in the installments and at the times as in said instrument provided, upon the same conditions, covenants and agreements as contained in said agreement of June 15, 1909; that it was also provided in said agreement of July 1, 1910, that all the rights and privileges granted and given to this defendant in and by said agreement of June 15, 1909, by the said Plaster Company and the said A. D. Mackey and Myra Post Mackey, were extended and renewed for a term of five years and were given and granted to this defendant to be used, enjoyed and exercised during said last mentioned term of five years as if the same were expressed in writing in said agreement of July 1, 1910, except such as were inconsistent with the terms thereof; that it was also provided in said agreement of July 1, 1910, that this defendant should have the right or privilege at its election to terminate therein granted at the expiration of any year of said term by giving to the Plaster Company thirty (30) days' written notice of the intention of this defendant to terminate the same, said notice to be given at any time within thirty (30) days'

prior to the expiration of any year of said term, and that upon the giving of such notice and at the expiration of the year during which any such notice should be given, the term therein granted and all the obligations and agreements of this defendant therein [29] should cease; and this defendant for further certainty as to the terms and conditions of said agreement of July 1, 1910, prays leave to refer to said agreement when the same shall be produced; that this defendant continued to occupy said premises during the term in said last mentioned agreement provided, and paid to the said Mackey Wall Plaster Company all of the rents therein agreed to be paid by it, and performed all the terms and conditions of said agreement in accordance with the provisions thereof.

VI.

This defendant admits that thereafter and on July 6, 1915, it entered into a further agreement in writing with the said plaintiff, a copy of which is annexed to said amended complaint and marked Exhibit "B"; and further answering says that it was provided in and by said agreement of July 6, 1915, that the said instruments dated June 15, 1909, and July 1, 1910, were in all things and respects extended, renewed and made valid and of full force and effect for the further period of one (1) year from and after the date thereof; that it was also provided therein that as a further consideration for said extension this defendant agreed that if it should determine that it would not avail itself of the option in said several agreements contained to purchase the

property of the said Mackey Wall Plaster Company upon the terms and conditions as in said several instruments provided, it would at least sixty (60) days prior to the first day of July, 1916, give the lessors a notice in writing to the effect that it would not purchase the said property under and by virtue of said agreements; that it was further provided therein that if this defendant should neglect or fail to [30] give such notice at least sixty (60) days before the first day of July, 1916, it would thereby become obligated to make such purchase and pay the consideration in said instruments provided to be paid in the event of purchase, upon the terms and conditions and in like manner as set forth in said several agreements, save and except as to the time for making the first payment in said agreements provided, and that in all other ways and respects the said agreements should be and remain in full force and virtue, the same to all intents and purposes as they would if therein set forth at large and confirmed word for word; that this defendant for greater certainty as to the provisions of said last-mentioned agreements prays leave to refer to said agreement when the same shall be produced.

VII.

This defendant admits that at its request the said plaintiff thereafter and on July 14, 1915, executed and delivered to it a certain instrument or letter dated July 14, 1915, but denies that said instrument is a modification of the aforesaid agreement of July 6, 1915; and further answering says that it was provided in said last-mentioned instrument that the

lease and option given to this defendant, as contained in the said agreements of June 15, 1909, and July 1, 1910, were in all things and respects extended and renewed and continued in full force for a term of one (1) year from July 6, 1915; and it was further provided in said instrument of July 14, 1915, that the only change in said agreements of June 15, 1909, and July 1, 1910, was, that in case this defendant failed to notify the said plaintiff of its election not to purchase on or before sixty (60) days [31] prior to the first day of July, 1916, then this defendant should be held to have elected to exercise the option of purchase contained in said contracts, and the said plaintiffs would thereupon become obligated to convey to it in manner as set forth in said contract of June 15, 1909, all the properties, chattels, leases, rights and interests described in paragraph "second" and "third" of said agreement of June 15, 1909, together with any and all other properties, chattels, leases, rights and interests mentioned in said contracts of June 15, 1909, and July 1, 1910, and that upon such conveyances being made, then this defendant was to pay to the said plaintiff the consideration mentioned in said contracts at the time and in the manner therein stated, the first payment of Fifteen Thousand Dollars ($15,000.00) to be made upon the execution and delivery of the conveyances above mentioned; that it was also provided in said instrument of July 14, 1915, that the notice to be given under said contract of July 6, 1915, would be sufficient is deposited in the United States mails, postage prepaid, and enclosed

in an envelope addressed to the said plaintiff, or A. D. Mackey or Myra Post Mackey, at the City of Great Falls, County of Cascade, State of Montana; that for greater certainty as to the provisions of said instrument of July 14, 1915, this defendant prays to refer thereto when the same shall be produced.

VIII.

This defendant admits that it was provided in the said agreement of July 6, 1915, that as a further consideration for said extension this defendant agreed that if it should determine that it would not avail itself of the option [32] in said several agreements contained to purchase the property of the said Mackey Wall Plaster Company upon the terms and conditions in said several instruments provided, it would at least sixty (60) days prior to the first day of July, 1916, give the lessors a notice in writing to the effect that it would not purchase the said property under and by virtue of said agreements, and that it was also provided therein that if this defendant should neglect or fail to give such notice at least sixty (60) days before the first day of July, 1916, it would thereby become obligated to make such purchase and pay the consideration in said instruments provided to be paid in the event of the purchase of said properties upon the terms and conditions in like manner as is set forth in said several agreements.

IX.

This defendant denies that it did not give the said plaintiff, or the said A. D. Mackey or Myra Post

Mackey, any notice in writing at least sixty (60) days before the first day of July, 1916, that it did not intend to purchase said properties under said option, but, on the contrary, this defendant further answering says that on April 19, 1916, more than sixty (60) days prior to July 1, 1916, it caused a letter to be addressed and mailed to the said A. D. Mackey addressed to him at 1224 Chestnut Street, Minneapolis, Minnesota, wherein it was stated that on May 5th the option of this defendant to purchase the mill property at Great Falls would expire, and that this defendant was writing to the said Mackey in advance of that date to inform him that conditions in Montana were such that it would be necessary for this plaintiff to cancel its arrangement with the said [33] plaintiff, and the said A. D. Mackey and Myra Post Mackey, at the time of its expiration on July 5th, meaning thereby the said agreements of June 15, 1909, July 1, 1910, and July 6, 1915, respectively; that although said letter was addressed to the said A. D. Mackey at 1224 Chestnut Street, Minneapolis, Minnesota, and not to the City of Great Falls, County of Cascade, State of Montana, as stated in said instrument of July 14, 1915, the same was received by the said Mackey on or before the 22d day of April, 1916; that it was also stated in said letter of April 19, 1916, that if the said Mackey cared to talk the matter over this defendant would be glad to have him visit its office for that purpose, and that this defendant expected to give to the said Mackey formal notice on May 5th that it did not care to purchase the said properties; that the said

Mackey, in pursuance of the suggestion to call upon this defendant as contained in said letter of April 19, 1916, wrote to this defendant that he would call upon this defendant on Thursday, the 27th day of April, 1916.

This defendant further answering says that the said A. D. Mackey was, at the time said last-mentioned letters were written as aforesaid and subsequent thereto, the President and General Manager of the said plaintiff, The Mackey Wall Plaster Company, and that all the negotiations for said leases, options and agreements had between the said Mackey Wall Plaster Company and this defendant were had with the said A. D. Mackey representing the said Mackey Wall Plaster Company; that all the rents paid by this defendant under said agreements to the said Mackey Wall Plaster Company were paid by it to the said A. D. Mackey representing the said Mackey Wall Plaster Company; that said A. D. Mackey is the husband of said Myra Post Mackey; that the said A. D. [34] Mackey and the said Myra Post Mackey were the owners of all of the capital stock of the said Mackey Wall Plaster Company, and that from the time of the making of said agreement of June 15, 1909, until the termination of said agreement of July 6, 1915, the said Mackey Wall Plaster Company was engaged in no business other than the leasing of said properties to this defendant and the collection of the rents under said agreements; that all of the business so conducted and carried on by the said plaintiff, The Mackey Wall Plaster Company, from June 15, 1909, was done

and carried on by the said A. D. Mackey representing the said Mackey Wall Plaster Company, and that the said A. D. Mackey was the agent and representative of the said Mackey Wall Plaster Company at the time of the events hereinafter stated.

This defendant further answering says that pursuant to the communications had between it and the said A. D. Mackey as aforesaid, the said A. D. Mackey on or about the 29th day of April, 1916, called upon this defendant at its main office in Chicago, Illinois, where he conferred with one O. M. Knode, the manager of operations of this defendant and in charge of the business of this defendant heretofore had and then had with the said Mackey Wall Plaster Company, at which conference there was also present one J. H. Nold, Chief Engineer of Mines of this defendant and in charge of the development and exploration of gypsum deposits in the properties owned, leased or occupied by this defendant; that at said conference the said A. D. Mackey was told by the said Knode and Nold that this defendant had decided not to purchase the said properties described in said instruments of writing, and that because of the difficulty in obtaining a sufficient quantity of material from the mines upon said [35] properties it was doubtful that the said properties could be successfully and economically operated in competition with the mills and mining operations of a new gypsum company which had opened a deposit near Lewistown, Montana; that the said Mackey then and there accepted the

notice so given to him as aforesaid, that this defendant had decided not to purchase the said properties, and thereupon entered into negotiations with this defendant for a further lease upon said premises, subject to termination upon short notice; that thereafter and during the whole of said conference the said Mackey and the representatives of this defendant as aforesaid discussed only the terms and provisions of a proposed further renewal and extension of the aforesaid lease and agreement; that at said conference and pursuant to such negotiations this defendant by its duly authorized representatives as aforesaid proposed to the said Mackey that this defendant would lease the said properties of the Mackey Wall Plaster Company for an indefinite period subject to cancellation upon sixty (60) days notice, and that the said Mackey then and there discussed the terms and conditions of such proposition and stated that before coming to a final agreement he desired to visit said properties and make an examination thereof, after which he would negotiate further with this defendant; that the said Mackey thereupon stated to the representatives of this defendant that he would go to Great Falls for the purpose of examining the then condition of the properties at Great Falls and Riceville, and he thereupon requests this defendant's said agents to write him at Great Falls the proposition then made to him and also to give him a letter of introduction to the operating superintendent of this defendant at the Great Falls properties with instructions to permit [36] him to go through the mill and mine upon said

properties and examine the condition thereof.

This defendant further answering says that it relied upon the statements made by the said Mackey at said last-mentioned conference, and that in pursuance of the request of the said Mackey this defendant gave him a letter of introduction to its said superintendent at Great Falls and also wrote to said superintendent requesting him to permit the said Mackey to visit and examine the said properties, and that this defendant did also in pursuance of the request of the said Mackey and on the 11th day of May, 1916, write the said Mackey at Great Falls the proposition made to the said Mackey at said conference, to the effect that this defendant would enter into an extension of those certain contracts of June 15, 1909, July 1, 1910, and July 6, 1915, respectively, for an indefinite term, or for the term of one (1) year, subject to cancellation upon sixty (60) days' written notice, rental to be paid monthly in advance, instead of yearly as theretofore; that it was also stated in said letter of May 11, 1916 that by the letter of April 19, 1916, this defendant had advised the said Mackey that it would not purchase said properties and that at the said conference it also advised him that it would not purchase the said properties, and it was also stated therein that although this defendant was unwilling to purchase said properties, it was willing to extend the said leases upon the conditions hereinabove stated; which said proposition to so extend the said lease was written to the said Mackey in pursuance of the said

conference had in Chicago on April 29, 1916, and at his special request.

This defendant further answering says that the said Mackey, following such conference as aforesaid, went to Great Falls, Montana, but did not inspect any of said properties [37] and sent no further communication to this defendant until May 12, 1916, when he sent to this defendant a letter written, as this defendant is informed and believes and so states the fact to be, by the attorney of the said plaintiff, wherein it was stated that since this defendant did not give notice in writing at least sixty (60) days before the first day of July, 1916, of an intention not to purchase, in accordance with the provisions of the said contract of July 6, 1915, it had therefore elected to purchase the property described in said several contracts of June 15, 1909, July 1, 1910, and July 6, 1915, and that it had occurred to the writers of such letters that possibly this defendant might wish to consummate the purchase by receiving the formal conveyances before the time stipulated in said contracts; that at the time said last-mentioned letter was so written as aforesaid the said Mackey and the said Mackey Wall Plaster Company knew that this defendant had not elected to purchase said properties, but, on the contrary, thereof this defendant had stated to the said Mackey that it would not purchase the said properties as aforesaid, and that it could not therefore have occurred to the said Mackey or to the Mackey Wall Plaster Company, or to Myra Post Mackey, that this defendant possibly might wish to consum-

mate said purchase and receive the conveyances before the time stipulated in said contracts, as stated in said letter; that prior to the time said letter was written the said Mackey had received the letter of this defendant of April 19, 1916, and if any further notice of the intention of this defendant was necessary under said contract the said Mackey at the said conference in Chicago on April 29, 1916, waived any such notice, and, as stated heretofore, entered into negotiations with this defendant for a [38] further lease upon said premises to become effective subsequent to the expiration of the said agreement of July 6, 1915, which said negotiations were wholly inconsistent with any agreement on the part of this defendant to purchase said properties, as stated by the said Mackey in said letter of May, 12, 1916; and this defendant avers that by reason of the aforesaid conduct of the said plaintiff it is forever barred from alleging or setting up that it received no notice in compliance with the terms of said contract, or that any notice received was in any respect inaccurate or insufficient.

X.

This defendant denies that it elected to purchase the property of the said Mackey Wall Plaster Company, as alleged in paragraph X of said amended complaint, but admits that on or about July 5, 1916, it received from the said Mackey Wall Plaster Company a warranty deed purporting to convey said properties to this defendant; that this defendant neither admits nor denies that said warranty deed was a good and sufficient deed of general warranty

and contained all of the specific warranties specified in said instruments of June 15, 1909, and July 1, 1910, but demands strict proof thereof; and this defendant for further certainty as to the contents of said deed prays leave to refer to the same when the same shall be produced by the said plaintiff; that at the time of the attempted delivery of said deed as aforesaid and from thence until the present time, the said Mackey Wall Plaster Company was not, and is not now, the owner in fee simple of all of the properties described in said contracts, and that the said Mackey Wall Plaster Company was then, and is now, unable to convey [39] a good title to said premises free and clear of all encumbrances whatsoever; and further answering this defendant says that the said Mackey Wall Plaster Company is itself unable to convey and transfer to this defendant the premises described in paragraph II of the plaintiff's amended bill of complaint.

XI.

This defendant denies all of the allegations contained in said paragraph XI of said amended complaint, and further answering says that each and all of said last-mentioned allegations are irrelevant and impertinent and improperly inserted in said amended complaint.

XIII.

This defendant admits that it refused to accept said deed and wholly refused and still refuses to carry out and perform the terms and conditions of said agreements of June 15, 1909, and July 1, 1910, relating to said option, but denies that it elected to pur-

chase said property in manner and form as aforesaid; and further answering this defendant denies that it is attempting and undertaking to repudiate any such election to purchase said properties, because it never at any time elected to make such purchase; that this defendant admits that it refused and still does refuse to accept said shares of stock, or said instrument in writing assigning said shares of stock to it, but further answering says that the allegations of said paragraph XIII of said amended complaint, that the defendant wholly refused to accept said shares of stock, or said instrument in writing assigning said shares of stock to defendant, and that said defendant is attempting and undertaking to repudiate its said election to purchase said property, are [40] irrelevant and impertinent and improperly inserted in said amended complaint.

XIV.

This defendant further answering says that it was provided in said agreement of June 15, 1909, that upon this defendant quitting and surrendering to the said Plaster Company the premises leased thereby, the said Plaster Company would at the election of this defendant repurchase from it all materials and supplies acquired by this defendant, pursuant to the terms of this agreement, at the price paid for the same by this defendant, and that the said Plaster Company would purchase from this defendant all other materials and supplies then on hand in said plaster plant at Great Falls at the reasonable value thereof, and would repay to this defendant any unearned premium or premiums on any and all poli-

cies of insurance upon said premises, and likewise the unearned portion, if any, of any rental paid by this defendant to the Railway Company mentioned in said lease, and that in the event that pursuant to the provisions of said agreement this defendant should have made any alterations or changes in the buildings or premises, or should have erected or constructed any fixtures therein or thereon with the approval of the said Plaster Company, then the said Plaster Company would pay to this defendant the then reasonable value thereof; that this defendant at the expiration of said extension of July 6, 1915, and on the 5th day of July, 1916, vacated all of said premises and delivered to the said plaintiff the keys to the buildings thereon and notified the said plaintiff that it had vacated the said premises; that this defendant also notified in writing [41] the said plaintiff that it was obligated to pay to it under the terms of said contract of June 15, 1909, the following sums of money:

The cost price of materials and supplies then in the possession of this defendant and acquired by it from the said plaintiff, amounting to Six Hundred Thirty-nine Dollars and Eleven Cents ($639.11);

The reasonable value of all other materials and supplies on hand on July 6, 1916, amounting to Three Thousand Nine Hundred Thirty-four Dollars and Forty-one Cents ($3,934.41);

The unearned premium on policies of insurance held by this defendant upon said premises,

amounting to Eighty Dollars and Thirty-five Cents ($80.35);

The unearned portion of the rental paid by this defendant to the Great Northern Railway Company, amounting to One Hundred Nine Dollars and Forty-four Cents ($109.44);

The reasonable value of all alterations or changes made by this defendant in the buildings or premises and of certain fixtures, as shown in the inventory delivered by this defendant to the said plaintiff, amounting to Two Thousand Four Hundred Twenty Dollars ($2,420.00);

all of which said sums of money, aggregating the sum of Seven Thousand One Hundred Eighty-three Dollars and Thirty-one Cents ($7,183.31), became due and payable to this defendant on the 6th day of July, 1916, upon the termination of said lease and in accordance with the terms and conditions thereof; that although this defendant has demanded the payment of said sums of money from the said plaintiff, the said plaintiff has wholly failed and refused to pay the same, or any part thereof, and that the same is now due and owing to this defendant with interest at the rate of six per cent (6%) per annum from said last-mentioned date. [42]

XV.

This defendant, in accordance with Rule 29 of The Rules of Practice for the Courts of Equity of the United States, further answering says:

(a) That all of the allegations of said amended complaint to the effect that at the same time and in the same instrument the said A. D. Mackey and Myra

Post Mackey, as holders and owners of all of the capital stock of plaintiff, The Mackey Wall Plaster Company, gave and granted to defendant irrevocably the right and option at any time during said one year, or during said five year term, if defendant should not have elected to purchase said property and property rights, to purchase of them and each of them all of the issued shares of the capital stock of the plaintiff, The Mackey Wall Plaster Company, for the sum of Fifty Thousand Dollars ($50,000.00), payable at the same time and in the same manner as hereinbefore set forth for payment of the purchase price for said property and property rights, save and except that in the event that the defendant should elect to purchase said shares from said shareholders, and not said property and property rights from said Plaster Company, then in that event the said cash payment should be made to the said plaintiff's shareholders at the time of the delivery of the certificates for such stock, and the said notes should be delivered to and be payable to the order of said shareholders, and the said plaintiff's shareholders then and there agreed in said instrument that at the time of the making of said cash [43] payment and the execution and delivery of said notes, as in said instrument provided, the said shareholders would deliver to said Gypsum Company the certificates of stock representing all of the issued shares of said plaintiff, The Mackey Wall Plaster Company, duly endorsed to said Gypsum Company and effectual to transfer the same to the said Gypsum Company on the books of the said plaintiff,

The Mackey Wall Plaster Company, found in paragraph III of said amended complaint; that on July 5, 1916, A. D. Mackey and Myra Post Mackey made and acknowledged an instrument in writing wherein and whereby they granted and conveyed to defendant all of their shares of stock in the plaintiff, The Mackey Wall Plaster Company, and accompanying said instrument and annexed thereto were the certificates of stock representing all of the shares of said A. D. Mackey and Myra Post Mackey in the said plaintiff, The Mackey Wall Plaster Company, to wit, all of the shares of stock in the said plaintiff, The Mackey Wall Plaster Company, and said certificates were duly endorsed by A. D. Mackey and Myra Post Mackey, to the defendant so as to enable defendant to have the same transferred upon the books of the said plaintiff, The Mackey Wall Plaster Company, and plaintiff at the same time, to wit, on July 6, 1916, that it tendered to defendant said instrument in writing assigning, conveying and confirming said shares of stock to defendant and demanded of defendant that defendant pay to plaintiff the purchase price aforesaid of said property, to wit: [44] Fifty Thousand Dollars ($50,000.00), Fifteen Thousand Dollars ($15,000.00) thereof to be paid in cash and the remaining Thirty-five Thousand Dollars ($35,000.00) to be paid by notes of this defendant, and demanded that defendant execute and deliver to plaintiff the notes of defendant for the said remainder of said price of said property and property rights payable at the time and in the manner provided in said agreements dated June 15,

1909, and July 1, 1910, and plaintiff avers that it offered to deduct from the cash payment due from defendant as aforesaid all that was due for principal and interest upon the said note of said A. D. Mackey and Myra Post Mackey, as aforesaid, found in paragraph XI of the said amended complaint; that the defendant wholly refused to accept said shares of stock, or said instrument in writing assigning said shares of stock to defendant, and that said defendant is attempting and undertaking to repudiate its said election to purchase said property, found in paragraph XIII of said amended complaint; and so much of the prayer of said amended complaint wherein the plaintiff alleges that it brings and deposits in this court the instrument so as aforesaid tendered to defendant assigning to defendant all of the capital stock of the said plaintiff, The Mackey Wall Plaster Company, and the certificates of stock representing said shares of stock of plaintiff, The Mackey Wall Plaster Company, and praying that the defendant be required to accept and receive said instruments; are each and all, and every part thereof, irrelevant and impertinent, in [45] that they are allegations not material to the issues made or tendered by said amended complaint, and should be expunged therefrom.

(b) That the plaintiffs in said amended complaint have failed to allege that the United States Gypsum Company, the defendant therein named, determined not to purchase said properties described in said contracts sixty (60) days prior to July 1, 1916, and failed to give to the said plaintiff notice, in accord-

ance with said contracts, of its determination not to purchase.

(c) That the said amended complaint does not state any matter of equity entitling plaintiff to the relief prayed for, nor are the facts as stated sufficient to entitle plaintiff to any relief against this defendant.

WHEREFORE, the defendant moves that said amended complaint, or such parts thereof as may be irrelevant and impertinent, be dismissed.

Having thus made full answer to all the matters and things contained in the said amended complaint, this defendant prays that it have judgment for the said several sums of money mentioned in paragraph XIV hereof, aggregating Seven Thousand One Hundred Eighty-three Dollars and Thirty-one Cents ($7,183.31), together with interest thereon, and that said amended complaint be dismissed, and that this defendant recover its costs in this behalf incurred.

UNITED STATES GYPSUM COMPANY,
By SCOTT, BANCROFT, MARTIN & STEPHENS.
NORRIS & HURD,
Its Solicitors. [46]

Exhibit "A" to Answer to Amended Complaint.

THIS INDENTURE, made this 15th day of June, in the year Nineteen Hundred and Nine, by and between THE MACKEY WALL PLASTER COMPANY, a corporation duly organized and existing under and by virtue of the laws of the State of Montana, party of the first part, A. D. MACKEY and

MYRA POST MACKEY, of the City of Great Falls, County of Cascade and State of Montana, parties of the second part, and the UNITED STATES GYPSUM COMPANY, a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey, party of the third part, WITNESSETH, that,

WHEREAS, the said party of the first part hereto (which is hereinafter referred to as the Plaster Company), acting by and through the said A. D. Mackey, its President, has offered to lease to the party of the third part hereto (which is hereinafter referred to as the Gypsum Company), the mining property and manufacturing plant now owned by said Plaster Company which are hereinafter more particularly described, together with all rights, privileges, and easements appurtenant thereto or used in connection therewith; and, as an inducement to the acceptance of such lease by said Gypsum Company, upon the terms heretofore agreed upon and hereinafter set forth, the said Plaster Company, acting by and through the said A. D. Mackey and Myra Post Mackey, the holders and owners of more than three-fourths of all the issued shares of its capital stock, has offered and agreed to sell to said Gypsum Company the right, privilege and option of purchasing from said Plaster Company the property and property rights hereby leased, at the price and upon the terms and conditions heretofore agreed upon and hereinafter set forth, and, as an inducement to the acceptance by said Gypsum Company of said lease and said option, from said Plaster Company, the said

A. D. Mackey and Myra Post Mackey, the parties of the second part hereto (who are hereinafter referred to as Plaster [47] Company, shareholders) have offered and agreed to sell unto said Gypsum Company the right, privilege, and option of purchasing from them, and each of them, all of the issued shares of the capital stock of said Plaster Company, at the time, for the price and upon the terms and conditions herein stated; and

WHEREAS, the said Gypsum Company, acting by and through S. L. AVERY, its President, has accepted said several offers hereinbefore recited on the part of said Plaster Company and its shareholders, upon the terms and subject to the conditions hereinafter set forth; and

WHEREAS, for the purpose of specifically defining and declaring the respective rights, duties, privileges, and obligations of each of said parties hereto, under the contracts heretofore entered into between them, the said parties have agreed to the due execution and delivery of this instrument in duplicate, on behalf of each of them; and

WHEREAS, prior to the execution and delivery of this instrument on behalf of either of the corporate parties thereto, the granting of said option, and the making of said lease by said Plaster Company, as herein set forth, were duly authorized, adopted, sanctioned, and approved, by its stockholders at a meeting lawfully called and at which all of the issued shares of its capital stock were represented by the attendance of the shareholders in person or by proxy, and also by the resolution of its Board of Directors,

lawfully adopted during a duly called meeting of such Board; and

WHEREAS, the due execution, acknowledgment and delivery of this instrument, in duplicate, on behalf of each of said corporate parties, by the executive officers thereof and the attaching thereto of the corporate seal of each of them, by such officers, was duly and expressly authorized and directed by the Board of Directors of each of them at a meeting duly called and held; [48]

NOW, THEREFORE, IN CONSIDERATION of the mutual and dependent covenants hereinafter contained, and the fulfillment thereof by each of the parties hereto respectively, and in further consideration of the sum of ONE DOLLAR ($1.00), each to the other this day in hand paid, the receipt and sufficiency whereof are hereby acknowledged, the said parties of the first, second and third parts hereto do hereby undertake, covenant, stipulate and agree to and with each other as follows:

FIRST. It is hereby specially understood and agreed, by and between all the parties hereto, that all of the stipulations, covenants and conditions herein contained, constitute covenants running with the land herein described and shall be binding upon the parties hereto and the heirs, personal representatives, successors and assigns of the respective parties hereto, and shall likewise be for, and inure to the benefit of, the heirs, personal representatives, successors and assigns of each of the respective parties hereto.

SECOND. The said Plaster Company does

hereby demise and lease to the said Gypsum Company, for the full term of one year from the fifth day of July, 1909, the following described real estate and mining property situated in said County of Cascade and State of Montana, to wit:

a. All the right, title, interest and estate of said Plaster Company in and to those tracts of land near the town or village of Riceville, in said County, which are described as follows: The Southeast quarter of the Southwest quarter (S.E. ¼ S.W. ¼) of Section Twenty-four (24); the East Half of the Northwest quarter (E. ½ N.W. ¼) and the Northeast quarter (N.E. ¼) of Section twenty-five (25), Township seventeen (17), North of Range six (6), East of the Montana Principal Meridian; and all the right, title, interest and estate of said Plaster Company in and to the Southwest quarter (S.W. ¼) of Section Fourteen (14), Township Seventeen (17) North of Range Six (6) East of the Montana Principal Meridian; the same being all of the rights in and title to said several tracts of land which were acquired by said Plaster Company by and through the conveyance to it of said property by the parties of the second part to this instrument by deed bearing date the 16th day of October, 1908, which is of record in the office of the County Clerk and Recorder [49] of said Cascade County in Book 53 of Deeds on Page 332; TOGETHER with all minerals in or under said land, all rights, privileges and easements incident or appurtenant

thereto, and especially all rights acquired by said Plaster Company in or concerning the use of land adjacent to said tracts of land hereinbefore described, under and by virtue of the written instrument duly entered into by and between Villa Clara Albright and William H. Albright, her husband, as parties of the first part and the said Plaster Company as party of the second part thereto, on the 15th day of June, 1909, as well as all rights, privileges, easements, and rights of way, granted to said Plaster Company by J. Walter Rice, David Rice, and Mary Rice, wife of said David Rice, in and over certain other land in the vicinity of said tracts herein and hereby leased, by their written instrument duly entered into with said Plaster Company on the 4th day of June, 1909.

b. All of the right, title, interest, and estate of the said Plaster Company in and to that certain tract of land in or near the City of Great Falls, in said county of Cascade, which is described as follows: Beginning at a point fifty (50) feet Northwesterly from and at right angles to the center line of the B. & M. Smelter Branch as measured from a point in the said center line 790 feet Northeasterly from its intersection with the South line of Section Two (2), Township Twenty (20) North of Range Three (3), East; thence Northeasterly parallel to the said center line 195 feet; thence North along the East boundary line of the right of way of the Great Northern Railway Company's line of

railroad 220 feet; thence West at right angles 200 feet to the West boundary line of the said right of way; thence Southerly along said boundary line 370 feet; thence Easterly in a straight line 175 feet, to the place of beginning; being all of the rights in and title to said tract of land which were acquired by said Plaster Company by and through the Indenture of Lease therefor which was duly entered into between the Great Northern Railway Company and said Plaster Company on the 22nd day of June, 1908, and subject to all of the terms and conditions therein set forth, a true copy of which said Indenture of Lease is hereunto attached as part of this instrument and marked "Exhibit Plant Lease."

And the said Plaster Company leases the said real estate and mining property situated near said village of Riceville, with all of the rights and privileges incident or appurtenant to it as aforesaid, and subleases said real estate situated in or near said City of Great Falls, subject to the terms and conditions of the original lease to it as aforesaid; together with all buildings and other improvements upon said mining property near Riceville, and all buildings owned by said Plaster Company upon any land adjacent thereto and also all buildings and other improvements upon said leased land in or near the City of Great [50] Falls, including the manufacturing plant and storehouse structures thereon, and also all apparatus, machinery, tools, office furniture, fixtures, implements and other property of

every kind which is owned by said Plaster Company and is customarily used, or is useful in the operation of the said mine and mining property near Riceville, or in the conducting and managing of said Manufacturing Plant in or near the City of Great Falls, at and for the yearly rental of three thousand dollars ($3,000.00), payable in advance at the time when this instrument has been duly executed and delivered on behalf of said lessor and possession of the demised property delivered to said lessee.

THIRD. The said Plaster Company, as lessor, in consideration of the payment of said rental, hereby grants to said Gypsum Company, as lessee, the right to exercise, use and enjoy during the term hereby created, all the rights and privileges which were reserved to the parties of the second part hereto in the deed from them to Thor A. Weggeland bearing date the 1st day of October, 1908, and of record in the office of the said County Clerk and Recorder of said Cascade County, in Book 53 of Deeds at page 325, and which said rights, privileges, and easements were subsequently conveyed by said parties of the second part hereto said Plaster Company, as hereinbefore recited. And said Gypsum Company, for the consideration as aforesaid, is hereby especially granted, as lessee hereunder, the right to extract gypsum and other minerals from said mining property at or near Riceville, and to use and consume the same in the manufacture of plaster, or for any other uses or purposes, as fully in all respects as might have been done by said Plaster Company prior to the making of this lease, and as fully and in all

respects as might have been done by said parties of the second part hereto prior to the conveyance of said reserved rights, powers, privileges, and estate by them to said Plaster [51] Company; including the right to make new openings in said mining premises and to prospect for and dig, open up, and operate new mines therein or thereon; such gypsum and other minerals, when so mined, extracted or removed, to be and remain the property or other consideration or payment therefor, as it ever has been, or could have become, owned by said Plaster Company, or by the parties of the second part, its predecessors in title to said property.

FOURTH. For the consideration hereinbefore recited, the said Plaster Company hereby grants to said Gypsum Company the right and privilege to extend and renew this lease for a term of five (5) years from the date of the expiration of the term of one year hereby created, such new term to be upon the same conditions and the same reserved yearly rental, payable annually in advance, as are herein and hereby provided as to said first term; and said Plaster Company specially undertakes and agrees to duly execute and deliver to said Gypsum Company a new written lease for said period of five years of all of the property and property rights herein described whenever, at any time during said term of one year, so requested in writing by, or on behalf of, said Gypsum Company, such new indenture of lease to contain all of the covenants, conditions, and agreements which are found in this written instrument, as part of said first lease; But, if, for any

reason or cause, such new written instrument should not be executed and delivered, when requested by said Gypsum Company, any written notice by said Gypsum Company to said Plaster Company of the election of said Gypsum Company to extend the term thereby created, by creating said second term, shall, if given at any time during said one year term, have the full force and effect of such new instrument and shall operate thereupon to extend this indenture, create said second term, and [52] make applicable thereto all the covenants and agreements herein contained.

FIFTH. It is further covenanted and agreed that, during the continuance of said one year term and of any extension or renewal thereof, the said Gypsum Company may make any reasonable changes or alterations in the buildings and premises hereby leased and may construct and erect any fixtures therein or thereon which in its opinion shall be suitable, proper, or convenient in the extraction or removal of gypsum or other minerals in, on or under said mining premises at Riceville, or in conducting said Manufacturing plant at Great Falls, or in the storage or shipment of any of the products of said mines or plant.

SIXTH. And said Gypsum Company does further covenant and agree to pay to said Great Northern Railway Company, for and on behalf of said Plaster Company, the rental which shall become due from said Plaster Company to said Railway Company under and by virtue of said indenture of lease between said Plaster Company and said Railway

Company until the expiration or sooner determination of the term hereby created and of any extension or renewal thereof.

SEVENTH. Said Gypsum Company does covenant and agree that, during the continuance of said one year term and of any extension or renewal thereof, it will keep all buildings which are now erected on said mining premises or on said premises at Great Falls on which said plaster plant is located, insured against risks of loss by fire to the extent of a total insurance of $18,000.00, the policy or policies of insurance therefor to be taken in the name of and for the benefit of said Plaster Company. It is further understood and agreed that, if at the time said Gypsum Company shall take possession of said premises pursuant to the terms of this agreement, said Plaster [53] Company shall have any outstanding insurance on said buildings, the Gypsum Company shall, at the election of said Plaster Company then to be made, pay to said Plaster Company the amount of any unearned annual premium on said insurance to the extent of $18,000.00 insurance, said payment to be made within thirty (30) days after possession shall have been taken as aforesaid; and insurance, the unearned annual premium on which the said Plaster Company shall elect that said Gypsum Company shall pay, shall be considered insurance provided by said Gypsum Company at the time of such election in fulfillment of its covenant in that behalf herein contained; it being understood that if said Gypsum Company shall make any additions to said buildings or erect any new

buildings upon said premises, such additions or new buildings shall be insured, if at all, by said Gypsum Company for its own benefit and at its own expense and not covered by or included in said insurance of $18,000.00.

EIGHTH. It is further understood and agreed that if said buildings now on said premises, or any of them, shall, during the continuance of said term, or of any renewal or extension thereof, be destroyed or damaged by fire or other causes covered by any insurance in the name of said Plaster Company, the said Plaster Company shall immediately rebuild the same and repair the said damage to the extent of the amount of insurance due or to become due by reason of such destruction or damage. And if by reason of such destruction or damage, said buildings or any of them shall be rendered unsuitable or untenantable for the purposes for which they are hereby leased, the said Gypsum Company may, at any time within thirty days after such destruction or loss shall have occurred, elect to terminate the term then subsisting, and thereupon the term then subsisting shall cease and determine. And if said Gypsum Company shall not exercise its said privilege of election, and said buildings or any of them **[54]** shall continue unsuitable or untenantable for the purposes for which they are hereby leased, for the period of more than thirty (30) days after such loss or destruction shall have occurred, then the said Gypsum Company shall be entitled to a refund of the unearned portion of the said annual rent paid pursuant to this agreement for the period extending

from the date of such loss or destruction until said Plaster Company shall have rebuilt or repaired said building, and likewise to a similar allowance and refund (to be made by said Plaster Company) of rent paid, as hereinbefore provided, by said Gypsum Company to the Great Northern Railway Company as lessor of said Plaster Plant, which said last mentioned allowance and refund shall be estimated in the same manner as said refund of said rent paid to said Plaster Company.

NINTH. It is further understood and agreed that, on taking possession of the premises hereby leased, the said Gypsum Company shall buy of said Plaster Company, at the invoice price thereof, all materials and supplies of said Plaster Company in or about said premises at Great Falls of a character in their then condition immediately suitable for their ordinary use in operating said Plaster Plant in its own name and if the invoice prices do not include freight charges, then freight charges shall be added thereto; said purchase price to be paid by said Gypsum Company within thirty days after an inventory of said supplies and materials shall have thereafter been made. This agreement to purchase shall not be construed to include materials or supplies forming part of said mining premises or plaster plant as an existing mine or working plant.

TENTH. It is further understood and agreed that said Gypsum Company, after taking possession of said premises, shall pay off and discharge all undischarged liability of said Plaster Company to pay to its customers, according to the custom of the

[55] trade, a rebate of ten (10) cents a bag for all plaster bags then or thereafter to be returned by said customers to said Plaster Plant at Great Falls, the amount to be paid by said Gypsum Company in rebates as aforesaid not to exceed in all the sum of $1,666.60. All bags on which said Gypsum Company shall have paid rebates as aforesaid shall be the property of said Gypsum Company without further or other consideration or payment therefor. All other bags belonging to said Plaster Company and in or about said Plaster Plant, or returned pursuant to said custom of trade, over and above those on which said Gypsum Company shall have paid rebates, are hereby declared to be part of the supplies hereinbefore agreed to be purchased by said Gypsum Company at the invoice price estimated as aforesaid. Said Gypsum Company shall also assume and hereby does assume the liability of said Plaster Company to the Kansas City Bag Company arising by reason of said Plaster Company having heretofore ordered of said Kansas City Bag Company, on or about the 28th day of December, 1908, 100,000 burlap plaster bags, to be shipped on or before July 1st, 1909; the bags represented by said order, if shipped, to be considered the property of said Gypsum Company purchased from said Plaster Company by virtue of the assumption of said liability. Immediately upon taking possession of said premises, said Gypsum Company shall brand with the brand of said Gypsum Company all sacks then on hand and purchased from said Plaster Company as herein provided. And all outstanding sacks of said Plaster

Company which shall be returned for rebates pursuant to said custom of trade shall likewise be similarly branded when returned.

ELEVENTH. And subject to the conditions and stipulations hereinbefore contained, said Gypsum Company does covenant and agree that, on the expiration or sooner determination of the term hereby created, or any extension or renewal thereof, [56] it will quit and surrender the premises to said Plaster Company in as good order and condition as said lessee received the same, reasonable wear and tear and damage by fire and the elements excepted.

TWELFTH. Said Plaster Company does covenant and agree that, on said Gypsum Company's quitting and surrendering to said Plaster Company the premises hereby leased at the expiration or sooner determination of the term hereby created or by any renewal or extension thereof, said Plaster Company shall, at the election of said Gypsum Company, then to be made, repurchase from said Gypsum Company all materials and supplies acquired by said Gypsum Company pursuant to the terms of this agreement at the price paid for the same by said Gypsum Company pursuant to the terms of this agreement, and to purchase of said Gypsum Company all other materials and supplies then on hand in said Plaster Plant at Great Falls at the reasonable value thereof; and to repay to said Gypsum Company any unearned premium or premiums on any and all policies of insurance procured by said Gypsum Company in the name of said Plaster Company, pursuant to the provisions of this agreement;

and likewise the unearned portion, if any, of any rental paid by said Gypsum Company to said Railway Company and the unearned portion, if any, of the rental paid by said Gypsum Company to said Plaster Company for the year, of either of said terms, then current; and, in the event that, pursuant to the provisions of this agreement, the said Gypsum Company shall have made any alterations or changes in the buildings or premises hereby leased or shall have erected or constructed any fixtures therein or thereon, and the same shall have been made, constructed, or erected with the approval of said Plaster Company, the said Plaster Company shall pay to said Gypsum Company the then reasonable value thereof to said Gypsum Company; in case [57] any such improvements shall have been made, or any such fixtures shall have been constructed or erected by said Gypsum Company without having first obtained the approval of said Plaster Company to the making, construction, or erection of the same, the said Gypsum Company shall have the right to remove the same, provided such removal can be made without irreparable injury to the freehold and provided further that damage done in effecting such removal shall be repaired by said Gypsum Company at its own expense; said payment to be made by said Plaster Company, and said removal to be made by said Gypsum Company, within thirty days after the expiration or sooner determination of said term or of any renewal or extension thereof. Within the operation of the foregoing provision, said Plaster Company hereby in advance, irrevocably consents to

and approves of the removal by said Gypsum Company of all buildings owned by said Plaster Company situated on lands of said William R. Albright and said Villa Clara Albright, or either of them, adjacent to said mining premises at Riceville, and labor performed and money expended in removing said buildings shall be considered labor performed and money expended in the making of improvements with the approval of said Plaster Company within the meaning of the covenant in that regard hereinbefore contained.

THIRTEENTH. And said Plaster Company, for the considerations hereinbefore recited, does hereby give and grant to said Gypsum Company, irrevocably, the right and option to purchase of said Plaster Company, at any time before the expiration of said one year term, or, if said one year term shall be renewed or extended for said five year term, then at any time before the expiration of said five year term, all the property and property rights herein described, for the sum of Fifty Thousand Dollars ($50,000.00) payable as follows: Fifteen Thousand Dollars ($15,000.00) in cash at the same time with the [58] execution and delivery of the conveyance of said property and property rights by said Plaster Company, and the valance of $35,000.00 in seven promissory notes of said Gypsum Company, to be executed and delivered by said Gypsum Company to said Plaster Company at the time of the making of said cash payment, each of said notes to bear date the day on which said cash payment shall be made and to be for the principal sum of $5,000.00,

payable to the order of said Plaster Company, one three months, and the other respectively, six, nine, twelve, fifteen, and eighteen, and twenty-one months after the date thereof with interest thereon at the rate of 5% per annum from the date thereof until paid. And simultaneously with the making of said cash payment and the execution and delivery of said notes, as herein provided, the said Plaster Company will sell to said Gypsum Company and convey to it all the said property and property rights of said Plaster Company by a good and sufficient warranty deed, then to be executed and delivered by said Plaster Company to said Gypsum Company, covenanting therein especially that previous to the time of the execution of the said warranty deed, the said Plaster Company has not conveyed any estate or interest in said property or created therein any property rights in favor of any person other than said Gypsum Company, that said property and property rights are, at the time of the execution and delivery of said deed, free from incumbrances done, made or suffered by or through the act of said Plaster Company or any person claiming under it; and that said Gypsum Company shall enjoy said property and property rights without any lawful disturbance by any person or persons whomsoever. And said Plaster Company shareholders, for the consideration aforesaid, do give and grant to said Gypsum Company irrevocably the right, privilege and option, at any time during said one year or during said five year term, [59] if said Gypsum Company shall not have elected to purchase said property and prop-

erty rights, to purchase of them and of each of them all the issued shares of the capital stock of said Plaster Company for the sum of Fifty Thousand Dollars ($50,000.00), payable at the same time and in the same manner as hereinbefore provided for the payment of the purchase price for said property and property rights, except that, in the event that said Gypsum Company shall elect to purchase said shares from said shareholders and not said property and property rights from said Plaster Company, then and in that event the said cash payment shall be made to said shareholders at the time of the delivery of the certificates for such stock and the said notes shall be delivered to and be payable to the order of said shareholders. And at the same time with the making of said cash payment and the execution and delivery of said notes, as herein provided, the said shareholders will deliver to said Gypsum Company the certificates of stock representing all of the issued shares of said Plaster Company duly indorsed to said Gypsum Company and effectual to transfer the same to said Gypsum Company on the books of said Company issuing the same.

FOURTEENTH. Notice of election by said Gypsum Company to exercise its right and option to purchase from the Plaster Company the property and property rights herein referred to will be fully and effectually given, and said election shall be deemed fully and effectually exercised, for all purposes by the delivery of a written notice thereof to the President, Vice-president, or Secretary of said Plaster Company, or by depositing in the United

States postoffice in any city or town in the United States such written notice in a securely sealed envelope with the postage thereon prepaid addressed to said Plaster Company at Great Falls, Montana, or to the person who shall then hold any one of the official positions [60] in said company hereinbefore mentioned at his last known residence or place of business. And upon the giving of such notice in the manner aforesaid, the right of said Gypsum Company to the conveyance to it of said property and property rights, as hereinbefore provided, shall immediately vest, and the right of said Plaster Company to the purchase price therefor in the manner hereinbefore provided, shall immediately mature, and all other rights and obligations of the respective parties hereto shall thereupon determine and the said Gypsum Company shall thereby become the full and absolute owner of all of said property and property rights and said Plaster Company shall thereafter have no rights in or concerning said property but shall have only the right to the payment of the purchase price therefor at the time and in the amounts and by the methods hereinbefore provided. Notice of election to purchase said shares of stock may be given in the manner hereinbefore provided as to notice of election to purchase said property and property rights, excepting only that the written notice must be delivered in person to either of the parties of the second part hereto, or mailed to either of them in the manner hereinbefore provided for notice by mail to the Plaster Company, or, in the event of the death of either or both of said parties of the

second part hereto, or the transfer otherwise than by death of any part or all of said shares of stock or any interest therein, by delivery of said written notice to the successor or successors in interest of said parties of the second part or either of them, or by the giving to such successor or successors notice by mail in the same way as is hereinbefore provided.

FIFTEENTH. It is further especially understood and agreed, by and between the parties hereto, that, if the said Gypsum Company shall elect to purchase the property and property [61] rights of the Plaster Company after such property has been partially damaged or wholly destroyed by fire or other causes covered by any insurance in the name of said Plaster Company, then, and in that event, the said Gypsum Company shall immediately upon giving notice of election to buy as hereinbefore provided, succeed to all the rights of the said Plaster Company in any fire or other policy or policies covering said loss, including the right, to demand, collect, receive, adjust and give full receipts for all moneys which any Insurance Company may or should pay under such policy or policies and also the right to the benefit resulting from the rebuilding or repairing of the damaged structures, if the insurance company shall so elect. But if said Gypsum Company shall elect to purchase said property at the time and under the circumstances in this paragraph hereof recited, and shall thereupon, pursuant to the rights herein and hereby granted, collect from any insurance company any portion or all of such insurance money, or otherwise accept benefits from said insurance, as the purchaser

of said premises, it shall thereupon reimburse said Plaster Company for any sum or sums which it may have expended in repairing the loss or damage to said premises by fire prior to receiving said notice of election or prior to the payment of any funds by any such insurance companies.

SIXTEENTH. If, at any of the times herein authorized, the said Gypsum Company shall in the manner herein provided, elect to purchase the said property and property rights of said Plaster Company, and shall give due notice thereof as herein required, then and in that event, such portion of the rental theretofore paid by said Gypsum Company to said Plaster Company for the year of either of said terms then current, which shall be unearned at the time of the making of such election and the giving of such notice, shall be refunded to said Gypsum Company [62] by said Plaster Company, or, if said Gypsum Company shall so elect, may be by it deducted from the cash payment of $15,000, required to be paid by it as part of the purchase price of said property and property rights.

SEVENTEENTH. Whenever, under the provisions of this instrument, the said Gypsum Company shall have the right to exercise any privilege herein created and the manner of such election is not therein provided for, whether or not such right or privileges be to renew said leasehold term of one year hereby created, to terminate either of said terms, to require said Plaster Company to purchase buildings and improvements and supplies at the termination of said terms by expiration or otherwise, such election may,

in any of such events, be fully and effectually exercised by said Gypsum Company by the delivery of written notice or the mailing of such notice in the manner hereinbefore provided for the giving of other notices.

EIGHTEENTH. It is further understood and agreed that, during the term of one year hereby created and of any extension or renewal thereof, the said Plaster Company as lessor of said premises herein described will pay all taxes and assessments now or hereafter to be laid upon said demised property and property rights and every part thereof whenever the same shall become due and payable; and, if at any time during either of said terms, said lessor shall fail to pay any portion of said taxes or assessments when due and payable, in that event said Gypsum Company is hereby authorized to pay the same for and on behalf of said lessor and thereafter to demand and collect the same from said lessor by any lawful method or to deduct the same from any rental or other indebtedness then or thereafter to become due by said Gypsum Company to said Plaster Company, including the cash portion of the purchase price for said property, and property rights if any such payment or repayment [63] of taxes is due to said Gypsum Company by said Plaster Company at the time of the election to purchase said property and property rights as herein provided.

IN EXECUTION WHEREOF, in duplicate, each of the corporate parties hereto has caused these presents to be signed in its behalf by its president and its corporate seal to be hereunto affixed duly at-

tested by the signature of its Secretary, and the parties of the second part have hereunto set their hands and seals the day and year first above written.

THE MACKEY WALL PLASTER COMPANY.

By A. D. MACKEY,
President.

A. D. MACKEY. (Seal)

MYRA POST MACKEY. (Seal)

UNITED STATES GYPSUM COMPANY.

By S. L. AVERY,
President.

(Seal) Attest: RANSOM COOPER,
Secretary.

(Seal) Attest: S. T. MESERVEY,
Secretary. [64]

INDENTURE, made this 22d day of June, 1908, between the GREAT NORTHERN RAILWAY COMPANY, hereinafter called the "Lessor," party of the first part, and THE MACKEY WALL PLASTER COMPANY, hereinafter called the "Lessee," party of the second part, WITNESSETH:

The Lessor, in consideration of the payments and covenants herein stipulated to be made, kept and performed by the Lessee, does hereby demise, lease and let unto the said Lessee the following described real estate, situate in the City of Great Falls, County of Cascade, State of Montana, to wit:

Beginning at a point 50 feet northwesterly from and at right angles to the center line of the B. and M. Smelter Branch as measured from a

point in the said center line 790 feet northeasterly from its intersection with the south line of Section 2, Township 20 North, Range 3 East.

THENCE northeasterly parallel to the said center line 195 feet, thence north along the east boundary line of the right of way of said first party's railway, 220 feet, thence west at right angles 200 feet, to the west boundary line of the right of way, thence southerly along said boundary line 370 feet, thence easterly in a straight line 175 feet, to the place of beginning, as shown colored red and marked "A" on the plat hereto attached, which plat is hereby made a part of this agreement.

TO HAVE AND TO HOLD the above-demised premises unto the said Lessee, its successors and assigns, for and during the full term of ten (10) years from and after the first day of July, 1908.

The Lessee covenants to and with the Lessor to pay as rent for the above-demised premises the sum of Two Hundred and Twenty-five Dollars ($225.00) per annum, payable in advance on the first day of January in each year during said term.

The Lessee also shall and will pay all taxes, assessments and water rates, general and special, that may be levied or assessed or become due and payable upon said demised premises, and the buildings and improvements placed thereon by the Lessee during the term hereby demised, as and when the same become due [65] and payable and before the same become delinquent.

The Lessor covenants that during the term hereby

demised it will furnish and maintain adjacent to said premises suitable trackage not to exceed One Thousand Seven Hundred and Thirty feet (1,730) in length from its connection with the present trackage of the said Lessor's railroad, for the purpose of handling carload shipments to and from said premises, all grading for said trackage to be done by and at the sole cost and expense of the Lessee.

The Lessee covenants to and with the Lessor that it will on or before the first day of September, 1908, erect and complete, and during said term maintain in full and complete operation upon said premises a warehouse and mill for the manufacture, storing and handling of plaster, and that it will use and occupy said premises exclusively and solely for the purpose hereinabove mentioned.

It is further understood and agreed by and between the parties hereto that in case the Lessee shall for a consecutive period of thirty (30) days cease to maintain and operate said warehouse and mill and do business thereat, then this indenture and the term hereby demised shall immediately become cancelled and determined without any further act or notice.

It is agreed between the parties hereto that no railroad or other transportation company other than the Lessor and no person or persons engaged in transportation shall have the right or be allowed to use any track or tracks upon or extending to said premises without the express permission in writing of the Lessor.

The Lessee covenants to and with the Lessor that it will deliver or cause to be delivered to said Lessor

for transportation over the lines of railroad of said Lessor, all competitive shipments made by or to the said Lessee from or to [66] said premises, provided the rates and charges of said Lessor for such transportation shall be as reasonable and low as the rates and charges of other and competitive lines of railroad.

The Lessee shall and does hereby assume all risk and liability for any and all loss and damage to said warehouse and mill, their fixtures, appliances and appurtenances, and to the contents of said mill and warehouse and to all property stored or located in or upon said premises in any manner caused by fires set by locomotive engines of the Lessor, or otherwise, or by the neglect, carelessness or misconduct of any person or persons in the employ of the Lessor; and the Lessee hereby releases and discharges the Lessor from any and all liability on account of loss of or damage to said warehouse and mill, their fixtures, appliances and appurtenances, caused in any manner aforesaid, and shall and will indemnify and save harmless the said Lessor from any loss or damage on account of the destruction of or damage to said warehouse and mill and other property caused in the manner aforesaid.

The Lessee shall not and will not assign this indenture nor permit any other person or corporation to use or occupy any part of the premises hereby demised without first having obtained the written consent of the Lessor, its successors or assigns thereto.

In case the Lessee, its successors, or assigns, shall

fail to remove the buildings, structures and other property, placed upon said premises by it, within sixty (60) days after the termination of the term hereby demised, or any renewal or extension thereof, by lapse of time or otherwise, then all right, title and interest of the Lessee, its successors or assigns, in and to said buildings, structures and other property shall cease and the title to the same shall pass to and become vested in the Lessor. [67]

In case the Lessee shall fail to make the payments hereinabove provided for, or shall fail to keep and perform each and every of the covenants and conditions in this indenture stipulated to be by the Lessee kept and performed, then the Lessor may upon thirty (30) days' notice in writing cancel and determine this indenture and the term hereby demised and enter upon said premises and take possession thereof and exclude all persons therefrom.

It is further understood and agreed between the parties hereto, that the Lessee may, by giving to the Lessor at least thirty (30) days before this lease expires, a notice in writing of its desire to do so, continue in possession of said premises from year to year subject to all the terms and conditions herein contained, said continuance, however, to be at any time subject to termination upon thirty (30) days' notice in writing from either party to this agreement; subject to the following:

That the rental for said extended term shall be six per cent (6%) of the then value of said demised premises and the trackage constructed for the purpose of serving same; provided, however, that if said

valuation shall be such as to fix said rental at a less amount than that provided for the original term of this indenture, the rental for said additional term shall be Two Hundred and Twenty-five Dollars ($225.00) per annum. If the parties hereto fail to agree upon said valuation, same shall be fixed by appraisers, each party hereto to name one appraiser, and the two so chosen shall select a third and the award of any two thereof shall be conclusive and binding on each of the parties hereto. [68]

IN WITNESS WHEREOF, the parties hereto have caused this indenture to be duly executed the day and year first above written.

In presence of:

GREAT NORTHERN RAILWAY COMPANY.

By ————————————,

THE MACKEY WALL PLASTER COMPANY.

By ————————————. [69]

State of Montana,
County of Cascade,—ss.

On this 15th day of June, A. D. 1909, before me, Geo. Raban, a notary public for the State of Montana, personally appeared A. D. Mackey, known to me to be the president of the Mackey Wall Plaster Company, one of the corporations that executed the within instrument, and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year

in this certificate first above written.

[Seal] GEO. RABAN,

Notary Public for the State of Montana, Residing at Great Falls, Montana.

My commission expires on the 24th day of Dec., 1909. [70]

State of Montana,
County of Cascade,—ss.

On this 15th day of June, A. D. 1909, before me, Geo. Raban, a notary public for the State of Montana, personally appeared A. D. Mackey and Myra Post Mackey, his wife, known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] GEO. RABAN,

Notary Public for the State of Montana, Residing at Great Falls, Montana.

My commission expires on the 24th day of Dec., 1909. [71]

State of Illinois,
County of Cook,—ss.

On this 30th day of June, A. D. 1909, before me, Stanley S. Jenkins, a notary public in and for the county of Cook, State of Illinois, personally appeared S. L. Avery, known to me to be the president of the United States Gypsum Company, one of the corporations that executed the within instrument,

and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] STANLEY S. JENKINS,
Notary Public of the State of Illinois, in and for the County of Cook.

My commission expires on the 20th day of March, 1911. [72]

State of Illinois,
Cook County,—ss.

I, Joseph F. Haas, county clerk of the county of Cook, DO HEREBY CERTIFY that I am the lawful custodian of the official records of notaries public of said county, and as such officer am duly authorized to issue certificates of magistracy, that Stanley S. Jenkins whose name is subscribed to the proof of acknowledgment of the annexed instrument in writing, was, at the time of taking such proof of acknowledgment, a notary public in and for Cook County, duly commissioned, sworn and acting as such and authorized to take acknowledgments and proofs of deeds or conveyances of lands, tenements or hereditaments, in said State of Illinois, and to administer oaths; all of which appears from the records and files in my office; that I am well acquainted with the handwriting of said notary and verily believe that the signature to the said proof of acknowledgment is genuine; and further, that the annexed instrument is executed and acknowledged according to the laws of the State of Illinois.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the county of Cook at my office in the City of Chicago, in the said County, this 24 day of June, 1909.

JOSEPH F. HAAS,
County Clerk.

Endorsed on cover of instrument:

Office of County Clerk and Recorder,
County of Cascade, Montana.

I hereby certify that the within deed was filed for record in this office on the 20th day of July, A. D. 1909, at 3:00 o'clock P. M. and was duly recorded in book 1 of Leases, page 267.

DAVID M. WOOD,
County Clerk and Recorder.

Service of the foregoing Answer by receipt of a copy thereof is hereby acknowledged on this, the 19th day of January, 1917.

COOPER, STEPHENSON & HOOVER,
Attys. for Plaintiff.

Filed Jan. 20, 1917. Geo. W. Sproule, Clerk.
[73]

Thereafter, on January 27th, 1917, reply to answer was duly filed herein, in the words and figures following, to wit: [74]

In the District Court of the United States District of Montana.

THE MACKEY WALL PLASTER COMPANY, a Corporation,

Plaintiff,

vs.

UNITED STATES GYPSUM COMPANY, a Corporation,

Defendant.

Reply.

Now comes the above-named plaintiff, and for its reply to the answer of the defendant herein

ALLEGES:

I.

It DENIES each and every allegation, matter and thing in paragraph XIV of defendant's answer contained, and especially denies that plaintiff, in manner and form, as alleged by defendant, or otherwise, became or is indebted to defendant in any sum or amount whatever.

II.

Further replying to defendant's said answer plaintiff DENIES each and every allegation, matter and thing in defendant's answer contained not herein or in plaintiff's amended complaint alleged, admitted, qualified or denied.

WHEREFORE [75] plaintiff prays for the relief prayed for in its said amended complaint.

RANSOM COOPER,
COOPER, STEPHENSON & HOOVER,
Attorneys for Plaintiff.

State of Montana,
County of Cascade,—ss.

Ransom Cooper, being first duly sworn, deposes and says that he is one of the attorneys for plaintiff in the above-entitled action and that he has read the foregoing reply and knows the contents thereof, and that the matters and things therein stated and alleged are true according to the best knowledge, information and belief of affiant.

Affiant further says that the reason this verification is made by affiant and not by some officer of plaintiff is that no officer of plaintiff is now within the county of Cascade or State of Montana wherein affiant is and resides.

[Seal] RANSOM COOPER.

Subscribed and sworn to before me this 25th day of January, A. D. 1917.

W. H. HOOVER,
Notary Public for the State of Montana, Residing at Great Falls in Said County.

My commission expires February 2, 1917.
Filed Jan. 27, 1917. Geo. W. Sproule, Clerk.

Service of within Reply admitted Jan. 26, 1917.

SCOTT, BANCROFT, MARTIN & STEPHENS and
NORRIS & HURD,
Attys. for Defendant. [76]

Thereafter, on December 3d, 1917, statement of the evidence as approved was duly filed herein, in the words and figures following, to wit: [77]

In the District Court of the United States, District of Montana.

THE MACKEY WALL PLASTER COMPANY, a Corporation,

Plaintiff,

vs.

UNITED STATES GYPSUM COMPANY, a Corporation,

Defendant.

Statement of the Evidence to be Included in Record on Appeal.

Testimony of A. D. Mackey in Behalf of Plaintiff.

Direct Examination by Mr. HOOVER.

A. D. MACKEY, a witness in behalf of plaintiff, was called and sworn and testified in substance as follows:

My name is A. D. Mackey. I am president of The Mackey Wall Plaster Co., the plaintiff in this action, and have the active management and control of its affairs. I have read the complaint in this action. At all times mentioned in the complaint I was the president and acting manager of the plaintiff. I am familiar with the premises described in the complaint and in the agreement referred to in the complaint as entered into on June 15, 1909. The plain-

(Testimony of A. D. Mackey.)

tiff was the owner of those premises on June 15, 1909. I personally negotiated with the officers of the defendant for the making of the lease and agreement dated June 15, 1909. This lease and agreement was entered into of my own knowledge with S. L. Avery who was president of the United States Gypsum Co. at that time. [78]

The original lease and agreement of June 15, 1909, was exhibited to witness, by him identified and introduced in evidence as Plaintiff's Exhibit One. This exhibit is identical in language with exhibit "A" set forth as a part of defendant's answer and reference is made to exhibit "A" of defendant's answer for the wording of exhibit one of plaintiff.

The plaintiff entered into a further agreement with the defendant in the nature of a renewal agreement dated July 1, 1910. The original renewal agreement of that date was exhibited to and identified by witness and was introduced in evidence as Plaintiff's Exhibit Two and is identical in wording with exhibit "A" attached to and made a part of plaintiff's amended complaint. Mr. MacLeish, one of the solicitors for defendant, stated that defendant would admit all the documents subject to an opportunity to inspect them and thereby save time, and the Court consented thereto.

The original agreement dated July 6, 1915, between plaintiff and defendant was exhibited to witness, by him identified and introduced in evidence as Plaintiff's Exhibit Number Three and is in wording identical with exhibit "B" attached to the

(Testimony of A. D. Mackey.)

amended complaint of plaintiff.

Plaintiff's Exhibit Four was exhibited to witness and by him identified and introduced in evidence and is as follows:

Plaintiff's Exhibit 4—Letter, July 14, 1915, Knode to U. S. Gypsum Co.

July 14, 1915.

United States Gypsum Company,
205 West Monroe Street,
Chicago, Illinois.

Dear Sirs:

"We consider the terms of the supplemental contract made [79] by us with your company on July 6, 1915, as clear and unambiguous, but in order that there may be no question whatsoever as to the terms thereof, we are writing you our construction of the same.

"The lease and option given to you by us, as contained in the agreements of June 15, 1909, and July 1, 1910, are in all things and respects extended and renewed and continued in full force for a term of one year from July 6, 1915.

"The only change therein is that in case you fail to notify us of your election not to purchase, on or before sixty days prior to the first day of July, 1916, then you shall be held to have elected to exercise the option of purchase contained in said contracts, and we shall thereupon become obligated to convey to you, in manner as set forth in said contract of June 15, 1909, all of the properties, chattels, leases, rights

(Testimony of A. D. Mackey.)

and interests described in paragraphs 'Second' and 'Third' of said last mentioned contract, together with any and all other properties, chattels, leases, rights and interests mentioned in the contracts of June 15, 1909, and July 1, 1910, above mentioned. And upon such conveyances being made by us, then you are to pay to us the consideration mentioned in said contracts that the times and in the manner therein stated, the first payment of Fifteen Thousand Dollars ($15,000) to be made upon the execution and delivery by us of the conveyances above mentioned.

"The notice to be given under said contract of July 6, 1915, shall be sufficient, if deposited in the United States mails, postage prepaid, and enclosed in an envelope addressed to either of us at the City of Great Falls, County of Cascade [80] State of Montana."

Yours very truly,

O. M. KNODE,

Managing Operator.

Q. Mr. Mackey, did the Mackey Wall Plaster Company to your knowledge receive a notice in writing to the effect that the defendant had elected not to purchase the properties mentioned in the agreements referred to in the complaint?

By Mr. MACLEISH.—If the Court, please, I think I will have to object to that question. It calls for a statement from the witness in one of the issues in this case which is to be decided by the Court. I think the proper way to get at it is to state what was

(Testimony of A. D. Mackey.)

received and what was sent, so that we may have the question not foreclosed by the witnesses' answer.

By the COURT.—Yes, probably.

I received a letter from O. M. Knode dated April 19th with regard to the exercise or failure of defendant to exercise the option of defendant. I received that letter on the morning of April 22d. Witness identified original letter and same was introduced in evidence as plaintiff's exhibit five and reads as follows:

Plaintiff's Exhibit 5—Letter, April 19, 1913, Knode to Mackey.

UNITED STATES GYPSUM CO.
205 W. Monroe St.
Chicago, April 19, 1916. [81]

Mr. A. D. Mackey,
1224 Chestnut Street,
Minneapolis, Minn.

Dear Sir:

"On May 5th our option to purchase your mill property at Great Falls expires.

"I am writing you in advance of that date to inform you that conditions in Montana at this time are such that it will be necessary for us to cancel our arrangement with you at the time of its expiration, which is July 5th.

"We have had men looking for gypsum almost constantly since our last meeting, and so far our efforts have been fruitless.

"If you care to come down and talk the matter

over we will be glad to have you do so.

"Expect to give you formal notice on May 5th that we do not care to purchase your property."

Yours truly,

(Sgd.) O. M. KNODE,

Manager Operations.

OMK/M.

I went to Chicago on April 28th and had a conversation with the officers of defendant with reference to the matter mentioned in that letter. I talked with O. M. Knode in his private office. He is the only officer of the defendant I talked with on the subject. I talked with other officers on other matters.

I called at the general office of the Gypsum Company a little before eleven o'clock A. M. and sent my name into Mr. [82] Knode and was promptly taken into his private office, shook hands, and he at once asked me a number of questions regarding the physical condition of my wife. We went over that subject nicely and was done and then I said, "Well, Mr. Knode, what are the conditions in Montana? I am entirely in the dark, I haven't even received a letter from Mr. Cooper this year." He immediately says, "Well, I can tell you how things are in every respect at present in Montana." He says, "The Hanover folks are going ahead, they have got their foundation floor in and they have got their mill machinery contracted for, and, in a very short time, they will be on the market with their product, and they are coming on the market with a very much less mill price than we have at Great Falls, and," he says,

"We thought we could hand it to them pretty nicely a while ago; we got an option lease on adjoining property of theirs; we put our expert men to work drilling there endeavoring to find the same deposit they had, but we met with quite a surprise, for there was no deposit there, and, now," he says, "We are on another hunt for a deposit east of Hanover a considerable distance, and we have reasons for believing that we will find a satisfactory deposit; if we should find one, why, we would be in very good condition to have the Hanover folks realize that we are still in Montana doing business, because we can ship our raw material into Great Falls, as we are now shipping it in, on the same basis as we are now shipping it in from Riceville, and then," he said, "The Hanover folks have started out wrong, they shouldn't have built that mill there, they should have built the mill in Great Falls." I said, "Well, I cannot agree with you." "Yes," he says, "there's many reasons that make it an advantage in favor of Great Falls." I says, "I certainly don't agree with you on that." [83]

When we were done with that phase of it, I said, "I had intended to bring over from the hotel a blueprint of the Riceville Mine that your Mr. Nold gave me last July; I neglected to, but I will bring it over when I come back after lunch." He says, "That's not necessary, we have office copies on file here" and he pushed a button and a page came and he told him what he wanted and in two minutes it was there, a blue-print copy of *the and* the moment I seen it I said, "Well now, I will not have to ask so many

(Testimony of A. D. Mackey.)

questions, I guess, for I can understand this blue-print. Right from the start, it is a different blue-print from the one that I have. I am not saying this as any reflection but simply a blue-print of a different period of time. A minute or two after that, into Mr. Knode's office came Mr. Nold, the mining expert, engineer of the company, and he sat down and promptly Mr. Knode commenced asking him questions regarding his idea of the condition of the Riceville Mine, and he asked him a great many questions and Mr. Nold gave careful thought to the questions and answered them along, and I remember one of the questions was, "How long would the Riceville Mine be able to supply the requirements of the Great Falls Mill if no more work were done excepting removing the gypsum from the roof and the floor?" and Mr. Nold figured a minute or two and he said, "Why, there ought to be tonnage enough in the roof and the floor to run that mill for three or four years, but, of course," he says, "The refuse that is on the floor would have to be taken out of the mine on to the dump and that would cost some money, it would mean labor."

The conversation took a very wide range. Mr. Knode told me of the efforts they had going on for years, that I didn't know of, in different ways, searching for a satisfactory [84] deposit of gypsum close to a railroad that would be permitted to be put on without much expense, on the cars, and run in; he spoke of the Sun River and different places where he had been, many places he had been himself

(Testimony of A. D. Mackey.)

and he had had his field men out and he said he had to be frank and say that up to date they had never found anything that had a commercial value, that was available to a railroad.

We visited along, and I said to— directing my question to both of them— I said, "Well, what about Albright? What about your agreement made with Mr. Cooper and I that if we would extend this lease a year that you would run a tunnel in on the Albright land at a cost of five to seven thousand dollars and work out our gypsum from the downhill pole?" Immediately Mr. Nold spoke up and he says, "What would be the use? Albright has got no gypsum." I said, "Is that so? Well, hasn't he got as much gypsum as he had in July, 1915 and as he had up to a very few months ago"? And then Mr. Knode said, "Well, I will tell you, Mr. Mackey," he said, "We have had quite a time with Mr. Albright. I wrote several times regarding the matter, I was asking Mr. Cooper to be a little more strenuous in his efforts to get a lease for us from Mr. Albright"; he said "Albright started out with a price of twenty-five cents a ton royalty, which was prohibitive." He says, "Mr. Cooper, later on, was able to show that to him and at last," he says, "why, Mr. Cooper, got a price of ten cents a ton royalty from him." "Well," I said, "that was all right, that ten cents." "Yes," he says, "we had no objection to that price, but," he said, "Albright wanted the minimum amount of royalty to amount to a thousand dollars a year and he wanted the royalty to apply for five years,

(Testimony of A. D. Mackey.)

whether or not." And I said, "Well, that looks all right to me." [85]

The conversation did not eventually swing into anything concerning my property. We spoke about United States geologist's bulletins.

I asked Mr. Nold if he had ever seen the Government's Fort Benton folio. He thought he had not. I said, "it is worth looking at it; I have it with me at my hotel" and I said, "How are you fixed up for lunch"? and he says, "I am open." I said "All right, if you have got a clear conscience and a good appetite, you lunch with me and I will show you the folio." He said he would be pleased to and he looked at his watch and he said "Now, I will excuse myself now, because it is getting about a quarter to twelve and these things piled pretty high on my desk to-day, and," he says, "I will see you in thirty minutes at your hotel." I thanked him and he disappeared from the room, so Mr. Knode and I we talked along a few minutes and finally I glanced at my watch and I said "I guess I better be working over to the hotel, my guest might get there ahead of me." And then Mr. Knode said "Well, Mr. Mackey," he said, "On May 5th, or May 4th, whichever date it may be," he says, "we will send you our formal notice that we do not care to purchase your property." I said, "Well, whatever you folks decide to do, you may send to me care of Mr. Ransom Cooper." He turned his chair to the left, opened a drawer or something,—it might not have been to his desk, but he took out of it a good-sized memo-

(Testimony of A. D. Mackey.)

randum pad and he commenced doing some writing; as he finished his writing he said aloud "Care of Ransom Cooper," put his pad where he got it, turned his chair around facing me and I said, "Well, I was just thinking, Mr. Knode, that there must come times that the work that piles up on you and Mr. Nold must be something pretty fierce." "Well," he says, "it certainly does, Mr. Mackey, and right now is one of the high peaks." [86] "Already this year," he says, "we have had three labor troubles and," he says, "In June, we are going to have a big one at Fort Dodge."

Nothing further was said in that conversation about my properties or the option or lease of them. I later kept my appointment with Mr. Nold. I told Mr. Knode I would see him after lunch. Mr. Nold and I had lunch together at the hotel. During our conversation at lunch, our conversation took a very wide range, we looked at this folio a few minutes in my room, then we went down to the cafe, and there was an interesting place for both of us, we both had a good appetite, and we was there over an hour at the table, and as we ate and visited along, I said to Mr. Nold, "I wonder what Mr. Knode is figuring on; I haven't got him lined up right; I wonder what is in his mind." "Well," he says, "I don't know but I would guess that the company would like to continue the lease for a year, or two years, or three years, just as it is now, and hoping that in the meantime they can find a bed that can be very advantageously sent into Great Falls on the trains and used."

(Testimony of A. D. Mackey.)

He asked me what the property cost me when it was built. I told him the amount. He figured a few minutes and he says, "Well, now, it may be a surprise to you to know what wonderful conditions are now"; he says, "I believe, Mr. Mackey, it will cost twenty-five thousand dollars more to produce that property to-day than when you built it." I said, "Yes, I know that things are about as high as a man can look."

Nothing further was said about what the Gypsum Company proposed to do with my property and nothing was said about the company exercising the option or lease of my property. After lunch I went back to the office of the defendant and met Mr. Sam Fulton, vice-president of the company. [87] Nothing was said to him about the exercise by the defendant of the option to purchase or the leasing of my property. I also had a conversation with Mr. Meservey, the secretary of the company, but nothing was said to him about the lease or option on my property. I had another conversation with Mr. Knode that afternoon. As soon as I was done with Fulton and Meservey, I went up to the office of Mr. Nold and he took me into Mr. Knode's office. Mr. Knode came in shortly thereafter and said: "Well, Mr. Mackey, what is on your mind this afternoon?" And I said, "Well, Mr. Knode, practically speaking, my mind is a blank," I said, "I told you this morning what my wife's condition had temporarily done to me," and I said, "What is on your mind, Mr. Knode? He thought a minute and he said, "Well, Mr. Mackey,

(Testimony of A. D. Mackey.)

if my ideas should meet with approbation by the company'' he said, ''this is what I would favor,'' he says, ''I would favor continuing the lease as it now is, we paying our rent monthly in advance and we giving your company a ninety days' notice in case there should come a time that we wished to cancel the lease.'' And I said, ''Well, Mr. Knode, whatever you folks have to say,'' I said, ''put it in writing and send it to me care of Mr. Ransom Cooper.'' He said, ''All right, are you going to Great Falls soon?'' I said, ''Very promptly going to spend three or four months out there in that state with my wife.'' ''Well, now,'' he said, ''will you give us a prompt answer''? I said, ''Yes, certainly, will talk it over with Mr. Cooper when I get out there.'' He said, ''You know our pebble contracts that we have with Portland Cement Companies, we have to make those contracts ahead and we have to know what we are going to be able to do and say to them.'' I said, ''Yes, there will be no delay in our answering you.'' And so that was about all, and I looked at his desk and I said, ''Well, I think of nothing more, Mr. Knode, and if you don't, I will give you a heart handshake [88] and I will get away and let you go at this rubbish here; and he said, ''Well, something has got to be done with it,'' he says, ''it is getting fierce.'' And so I shook hands with him and stepped out of his office; out of the main office I turned to the left and went to Mr. Nold's desk and I said, ''Well, Mr. Nold, I will give you a hearty handshake and I will start back to Minneapolis this evening.'' And he at once said, ''Well, what did you

(Testimony of A. D. Mackey.)

and Mr. Knode do?" I said, "We didn't do anything," I said, "Mr. Knode is going to write us, Mr. Cooper, and," I said, "we are going to look over what he says and," I said, "he wanted to know if I could assure him of a prompt answer and I told him we could." He said, "When are you going to Great Falls?" I said, "In a very few days; I am going to take my wife to Riceville and out to Neihart and spend several months." I said, "When are you going out to Montana, Mr. Nold"? He threw up his hands and he says, "I can't answer such questions as that; I never know." He says, "A wire comes and I go east or I go south,— or I go." He says, "I never make plans as to when I am to be anywhere."

I did not have any further conversation with Mr. Nold before I left the building. After I got to the hotel I rang up Mr. Knode by phone and said: "Mr. Knode, I forgot to ask you for the customary letter of permit to look at the mill and the mine." He always gave me a letter saying that myself and my wife had the privilege of looking at the property. And he said, "Certainly, Mr. Mackey, and," he says, "I will include Mr. Cooper's name in the permit." And I said, "I thank you." He says, "I will mail it to you to Minneapolis"; and I thanked him and hung up the phone.

Since that time and conversation I have had no talk with Mr. Knode about exercising the lease and option upon my [89] property. I did not receive any notice from the defendant in my capacity as president of plaintiff or personally that the de-

(Testimony of A. D. Mackey.)

fendant did not wish to exercise its option on the property between the time I was in Chicago and May 5th. Shortly after May 5th I caused to be executed a deed to the property described in the several agreements and an assignment of the shares of the capital stock of The Mackey Wall Plaster Company to the defendant.

Plaintiff then offered in evidence as its exhibits six and seven the deed and assignment referred to. Defendant objected to the introduction of Plaintiff's Exhibit Seven, the assignments, upon the ground that the same were immaterial. The defendant by its solicitor MacLeish stated that it did not deny that the deeds were sent to the defendant and by the defendant returned to the plaintiff and did not deny that the assignment and shares of stock of plaintiff company were sent to the defendant and by the defendant returned to plaintiff, the defendant declining to accept the deeds and assignments for the reason that defendant had not purchased the property. Witness identified Plaintiff's Exhibit Eight and same was introduced in evidence and reads as follows:

Plaintiff's Exhibit 8—Letter, July 5, 1916, Mackey Wall Plaster Co. to U. S. Gypsum Co.

July 5, 1916.

United States Gypsum Co.,
205 West Monroe Street,
Chicago, Ill.

Gentlemen:—

"Since you have elected to purchase the property

of the Mackey Wall Plaster Company mentioned and described in a certain agreement between yourself and the undersigned dated June 15, 1909, in accordance with the [90] terms and conditions of said agreement and of the agreements between yourself and the undersigned dated July 1, 1910, and July 6, 1915, respectively, we beg to hand you herewith a Deed of Conveyance executed and acknowledged by the Mackey Wall Plaster Company, conveying to you all of the property, real and personal, described in and referred to in the said agreement dated June 15, 1909. In accordance with the terms and conditions and provisions of said several agreements, we also beg to hand you an instrument in writing dated July 5, 1916, executed and acknowledged by A. D. Mackey and Myra Post Mackey granting and assigning to you all of the issued shares of stock of the Mackey Wall Plaster Company together with the certificates representing such shares, thereby assigning to you all of the issued and outstanding shares of the capital stock of the said Mackey Wall Plaster Company."

"Upon receipt of these instruments and at your early convenience, we will thank you, after deducting the amount of the indebtedness of the Mackey Wall Plaster Company to you upon its note held by you from the $15,000 cash payment due upon the purchase price, to send us the balance of the cash and your seven (7) notes of $5,000 each, bearing date on which said cash payment is made, payable to the undersigned, one in three months and the others respectively in six, nine, twelve, fifteen, eighteen and twenty-one months after the date thereof with inter-

(Testimony of A. D. Mackey.)

est thereon at the rate of five per cent per annum from the date thereof until paid."

"In the event that you decide to retain the shares of stock by the instrument second above mentioned assigned to you, kindly make the notes payable to the undersigned [91] A. D. Mackey and Myra Post Mackey. But if you decide not to retain the shares of stock, then said notes should be made payable to the Mackey Wall Plaster Company."

"In respect to the subject matter of your letter of June 29, 1916, we beg to say that in view of your election to purchase the property of the Mackey Wall Plaster Company at Great Falls and Riceville, as we construe your acts the Mackey Wall Plaster Company has nothing to receive or take from you except the purchase price of said property."

Enc. Very truly yours,

(Sgd.) THE MACKEY WALL PLASTER CO.,

By A. D. MACKEY,

President.

Plaintiff's Exhibit Nine, Ten, Eleven and Twelve were introduced in evidence for the purpose of showing the title in plaintiff to the property described in its amended complaint and the agreements therein referred to.

Cross-examination by *RM*. A. E. MACLEISH.

At the time these leases were made my wife and I were the owners of all the shares of the Mackey Wall Plaster Company except two; one share was owned

(Testimony of A. D. Mackey.)

by Mr. Cooper and one by his stenographer. I think there were five hundred and fifteen shares issued. I owned one hundred and ninety-eight and my wife three hundred and fifteen. I was president of the company during all the times negotiations were carried on with the defendant and the manager of its affairs. The plaintiff was not a going concern after it made the lease to the defendant. I have known Mr. Knode nine or ten years. The first business transactions between the plaintiff and defendant were had between me and Mr. Avery, the president of the defendant, and later the business transactions were had with Mr. Knode. [92] At the time the last extension of the lease and agreement was made on July 6, 1915, there was no discussion between me and Mr. Knode as to whether or not there were workable gypsum deposits in the Riceville properties. There was a discussion as to obtaining gypsum from properties other than those owned by the plaintiff. We had some discussion concerning the want of workable gypsum, the high mining cost and that the deposit could not be taken out economically. At the time the last extension was made there was an entire day put in here in Great Falls and the proposition was discussed between us to the effect that if the lease would be extended for a year or more the defendant would lease the Albright property and would run a tunnel in that would cost from five to seven thousand dollars. This was to be in the nature of prospect work on the property of the plaintiff and the Albright property and was to be done by the de-

(Testimony of A. D. Mackey.)

fendant to find if the deposit could be economically worked. They (referring to Mr. Knode and Mr. Nold) said it could be done or they would not squander from five to seven thousand dollars going into it blind. They said at this time that the property could be economically worked. The extension was not made for the purpose of giving the defendant an opportunity to investigate and prospect the property. There was nothing put into the extension agreement about running this tunnel. We talked that over in the presence of Mr. Cooper. I said to Mr. Knode and Mr. Nold before the extension agreement was executed that if they would say all those things they said to me before Mr. Cooper that we would try to do something for them. We talked further that night and the extension agreement was drawn up the next morning. I corresponded with the defendant after July 1915 relative to prospect work on the property. Several letters [93] passed between me and the defendant after July, 1915, and before I went to Chicago the last time. Mr. Knode wrote me as late as December, 1915, that he was after Mr. Cooper to get the Albright land signed up. These letters were in connection with the prospect work that was being done by the defendant on the property. I do not recall receiving a letter from Mr. Knode or Mr. Nold in which it was stated that "conditions at the Riceville mine are about as explained to you last summer." I did not talk with Mr. Nold after the month of July, 1915, During the month of July at the time the last extension agree-

(Testimony of A. D. Mackey.)

ment was made I talked with Mr. Nold about the conditions at the Riceville mine. I did not see Mr. Nold in December, 1915. I received a letter from Mr. Knode dated December 5, 1915, in which he stated that "conditions at the Riceville mine are about as explained to you last summer." The conditions at the Riceville mine which were explained to me in July, 1915, were expensive mining, dip was going to the north, every ton had to be hauled uphill and one entrance had a block and tackle. I told them in July that when they paid me a little nominal consideration I would disclose to them knowledge that I had paid for a long time ago. After they signed up with me I disclosed that knowledge. Prior to July, 1915, they did not know what I had in mind. I did not know what they had in mind in the letter stating that the prospect work had not been very encouraging up to that time. The extension agreement dated July 6, 1915, was not made until July 14, 1915, I remember very well concerning the making of that agreement. Mr. Knode had no legal authority to sign up with me so he took the bunch of papers into Chicago for the president and secretary to sign. Mr. Cooper and I had already signed. I was living at the hotel Maryland, [94] Minneapolis, Minnesota, when I received the letter heretofore identified by me dated April 19, 1916. For several months I had been receiving communications from the defendant there. Upon receipt of this letter on April 22d, 1916, I answered promptly saying that I would go to Chicago. I received a letter from

(Testimony of A. D. Mackey.)

the defendant dated April 24, 1916. Witness here identified the letter of April 24, 1916. I went to Chicago in reply to that letter and arrived on Friday, April 28th. I met there Mr. Nold and Mr. Knode. I met Mr. Nold first and then went into Mr. Knode's Office. Shortly thereafter Mr. Nold came into Mr. Knode's office. The supplemental lease dated July 6, 1915, provides that "The lessee agrees that if it shall determine that it will not avail itself of the option in said several agreements contained to purchase the property, it will at least sixty days prior to the first day of July, 1916, give notice to the lessor." I wrote a letter dated May 12, 1916, addressed to the defendant in which I stated that no notice had been given to me and assumed that the defendant was ready to take conveyance of the property. When I wrote that letter I did not have knowledge of the fact that the defendant had determined not to purchase the property.

Q. How could you assume, Mr. Mackey, in the letter of May 12th, 1916, or make the statement that the United States Gypsum Company had failed to give the notice, unless you knew that it had determined not to purchase?

A. Well, their not giving the notice was the reverse; if they did not give the notice, then they elected to purchase.

Q. Oh, that is the way you look at the agreement?

A. Yes, had to be that way. [95]

When I was in Mr. Knode's office in Chicago, he told me that the defendant would not purchase my

(Testimony of A. D. Mackey.)

property and further stated that he would send me a formal notice on May 4th or 5th. Mr. Knode said to me about four minutes before I left his office at noon and he said it in this way exactly, identically; he said, "Mr. Mackey, on May 5th"—hesitated—"on May 4th, which ever the date may be, we will send you our formal notice that we do not desire to purchase your property." I answered, I said, "Well, whatever your company decides to do, you may send to me care of Mr. Ransom Cooper." He turned his office chair to the left and got out a good-sized memorandum pad, commenced writing on it, and as he finished his writing, he said aloud, "Care of Mr. Ransom Cooper," put his pad back and turned his chair back facing me. That was the only time that Mr. Knode said that they would not purchase the property.

Mr. Nold was not present when this conversation took place. He had been out of the office about ten minutes. During the time I was in Chicago, Mr. Knode made no other reference to the notice to be given to me. There was no conversation between Mr. Knode and me when Mr. Nold was present concerning the fact that the defendant would not take this property. During lunch I did not say anything to Mr. Nold about the memorandum made by Mr. Knode. I could have said it with propriety, because I was groping around and wondering what Mr. Knode had up his sleeve, and I let it come out to the surface, I said to Mr. Nold, "I wonder what Mr. Knode is figuring on, I wonder what he is work-

(Testimony of A. D. Mackey.)

ing at." He said, "I don't know, but it would be my guess that they would like to continue the lease I believe one year or two years or three years." So, as far as Mr. Nold is concerned, when I left him that afternoon, he had never heard from me that Mr. Knode had said that he was [96] going to mail the formal notice.

At that time I did not know that any notice which the defendant was required to send me must be sent sixty days prior to July 1, 1916. I knew there was a sixty days' notice provided for on the agreement but did not read the agreement carefully at the time it was signed because it was signed in a hurry. Mr. Knode was in a rush to get away. I always knew that a sixty days' notice was provided for but did not find out that this notice was to be given sixty days prior to July 1, 1916, until Mr. Cooper was reading the lease to me in his office in May. I cannot state the exact time in May when Mr. Cooper read to me the lease but it was a day or two after my arrival in Montana, which was in the early part of May, might have been the 3d, 4th or 5th of May. When I learned the facts concerning the sixty days' notice I did not communicate with Mr. Knode. The first communication I had with him after my visit to Chicago was one dated May 12, 1916. When I came to Great Falls and Mr. Cooper was reading to me the lease I first learned that sixty days' notice must be given prior to July 1, 1916. I had knowledge of the fact that Mr. Knode had said to me in Chicago that he would send a notice that the defendant would

(Testimony of A. D. Mackey.)

not take the property on May 4th, or 5th, 1916. I waited until May 12th, 1916, and then wrote the letter in which I stated that "you failed to give me notice."

Q. So that, as I take it, the first time that you learned of the alleged failure to give this notice, was when you came to Great Falls and consulted with Mr. Cooper.

A. Yes, sir; I called on him each day and asked him if he had any Gypsum mail from Chicago and he said, "No"; then he said, "Well, I guess I have got an explanation for it, Mr. Mackey," he said, "Important papers of corporation now are very often registered." [97]

I recall having received the letter from the defendant dated April 19, 1916, in which Mr. Knode stated that the defendant would have to terminate its relations with me at the end of the lease. I had that letter in mind when I wrote the defendant that it had not given me any notice. When I was in Chicago I talked with Mr. Knode and Mr. Nold concerning the making of a new lease. When I went back after dinner, after lunch, and Mr. Knode asked me what was on my mind, and I handed it back by asking what was on his mind, and he said, "Well, if it met with his company's approbation, he would favor a continuing of the lease, their taking their rent monthly in advance, they to give ninety days' notice in case they wished to surrender the property." In response to this statement of Mr. Knode I said, "Well, you put in writing what you folks have

(Testimony of A. D. Mackey.)

in mind and send it to Mr. Cooper." That is one of the writings which I wanted Mr. Knode to send to Great Falls. I also expected his formal notice that he was going to prepare on May 4th or 5th, that was item one that was to come to Mr. Cooper; that is the one he made the memorandum about, that was before lunch. After lunch, was this other matter of his proposal that he would like to continue the lease; I said, "Put in writing whatever you folks have in your mind and send it to Mr. Cooper," and he wanted to know if I would answer promptly, told him we would; told me the importance of having all the time possible because of the pebble contracts with Portland Companies.

I intended to go back to Minneapolis from Chicago, left Chicago that evening, April 28th. I received the letter from the defendant introducing me to their superintendent in Minneapolis. It got to Minneapolis the day I arrived there. [98] I arrived in Minneapolis for breakfast and the letter arrived that afternoon. I told Mr. Knode I was going to Great Falls promptly. I did not ask Mr. Knode to send the letter introducing me to Minneapolis. I was surprised when I received it in Minneapolis. I thought it would come to Great Falls. Letters addressed to me at Minneapolis, 1224 Chestnut Street, were usually delayed in reaching me. I have no recollection of telling Mr. Knode to send the letter introducing me to the superintendent, to the Maryland Hotel, Minneapolis. I will not state that I did not so direct Mr. Knode. Witness was

(Testimony of A. D. Mackey.)

shown and identified a letter addressed to him dated April 29, 1916, and a copy of a letter addressed to G. W. Marquardt, superintendent, and witness stated that he received these two letters in Minneapolis, or copies of them. Mr. Knode mailed them to me the day after I was in his office. Mr. Knode did not call a stenographer into his office during the time I was there. The only additional person in the office was a young man I have referred to as a page who answered the push button and got instructions to bring in a blue-print. He then disappeared and that was the only time he was there. The letter addressed to G. W. Marquardt, superintendent, was not dictated to a stenographer by Mr. Knode in my presence. It is not a fact that at the same time another letter was dictated to the superintendent and sent to Great Falls by Mr. Knode while I was in his office. Unless the page was a stenographer, there was no stenographer present in Mr. Knode's office while I was there. After I left Mr. Knode's office I telephoned him from the hotel that I had forgotten to ask for my usual letter. It was in this phone conversation with him that I asked for those letters. I wanted the letters so that I could look over the properties. There was no discussion concerning my examination [99] of the property for the purpose of making a new lease. I have always asked for those letters. There was no discussion with Mr. Knode concerning my examination of the properties in reference to the making of a new lease. Nothing was said about that at all. I left the Gypsum Company's offices about

(Testimony of A. D. Mackey.)

3:15, I think. Yes, I talked with Mr. Knode over the phone after I left his office. I did not suggest that the permit be given to me, Mrs. Mackey and Mr. Cooper. I did not mention Mr. Cooper and never did. His name had never before been in a letter to the superintendent. Mr. Knode merely said, "I will give you the letter of introduction and also give it to Mr. Cooper," and I thanked him for his courtesy. When I shook hands with Mr. Nold and said goodbye I told him that Mr. Knode and I did not do anything and that Mr. Knode was going to take the matter up with his company and whatever the company decided to do it would notify me of in Great Falls. That is what I meant by saying that Mr. Knode was going to write to Mr. Cooper. This conversation with Mr. Nold occurred just as I was leaving the building about 3:15. Mr. Knode said that they would send me a notice that they would not purchase my property. He said to me, just before I left for lunch, "Mr. Mackey, on May 5th," and then he hesitated, "on May 4th, whichever the date is," he says, "we will send you our formal notice that we do not desire to purchase your property." And I said, "Well, whatever you folks decide to do," I said, "you may send to me care of Mr. Ransom Cooper," and then he turned around and made his memorandum.

When we were discussing the making of a new lease I had no means of knowing what they had in mind. I was in the dark. They had a right to send that notice and they had a right not to. It was not a

(Testimony of A. D. Mackey.)

fact that when I left the office of the [100] Gypsum Company I was aware that the defendant had decided not to buy my property, if that had been their position. I know just a little about business and know that the thing then for them to have done was to have written out that formal notice and handed it to me and taken a receipt for it at the time. I went to Chicago in response to the suggestion of the defendant because I wished to talk the matter over. I wanted to find out what the conditions were in Montana referred to in that letter suggesting that I come to Chicago, I mean the conditions of the mine in Montana. I wanted to hear what they had to say. I don't think the defendant had decided not to buy the property at that time. I thought there was a string tied to the lay-out. I did not go to Chicago for the purpose of finding out why the defendant had decided not to buy my property. They had not said they were not going to. There is a letter right there which you have read which down at the bottom says, "we expect to do so and so." I smiled when I got that letter and said to myself, "Well, that is pretty smooth." I meant by being pretty smooth, that they had not said anything and they were left in a position to do or not do, as they might later on determine. Mr. Cooper did not tell me this. I got that out of this old gray stuff in my head.

Q. Now, will you please tell me what you went to Chicago for.

A. Well, I guess curiosity; we all have curiosity; it wasn't very expensive, I am pretty economical,—

(Testimony of A. D. Mackey.)

it wasn't a very expensive trip—and to hear what they had to say.

My wife was sick at the time and I delayed going on account of her illness. I decided to go simply for curiosity—perhaps information is the better definition of it. I had not thought what information I would get from going to Chicago. [101] I wanted to hear them talk and I wanted to ask some questions. I wanted to ask how it come that they were hotfooted up to a certain day to get the Albright lease and presto change in a day, why there was nothing doing. There was some other things I wanted to know which I don't think of now.

I received a letter at Great Falls from the defendant dated May 11, 1916. It stated, "that we are willing, however, to enter into an extension of these contracts whereby all of the provisions thereof are extended for an indefinite term, or, if you prefer, the contracts can be extended for the term of one year, subject to cancellation upon sixty days' written notice given by us to you of our intention to terminate the same, rental payable monthly in advance, instead of yearly as heretofore." We have got that letter in our files.

Q. That language which I have read to you contains in substance, does it not, the proposition for a new lease which you and Mr. Knode discussed in Chicago?

A. That is a proposition of some kind; I never read it but once; it came here and they did not know what to do with it, so it went over to his office here

(Testimony of A. D. Mackey.)

across the river and the superintendent was courteous enough to find out where I was and send the letter to me.

Q. Doesn't it, Mr. Mackey, contain in substance the proposition that you asked Mr. Knode to write to you in Great Falls?

A. Oh, I have no idea what they were going to write.

Mr. Knode stated to me in Chicago that if the company would acquiesce in his idea, he would favor continuing the lease subject to cancellation on ninety days' notice. I said to him, "Whatever your company decides to do in the matter put in writing and send it out." I received the letter and [102] it speaks for itself. I did not examine the mill property or the Riceville property when I arrived in Great Falls. Those letters of introduction were for the purpose of permitting me to examine the properties. My main purpose in coming out here was not to examine the properties. I wanted to see if the trip would not do my wife some physical good and it did her a whole lot of good. It is not a fact that I wanted to examine the property in connection with the new negotiations for a lease that had arisen between Mr. Knode and me in Chicago. It is not true that I intended to use the letters for that purpose when I came to Great Falls. I always asked for such letters on coming out here. It had gotten to be a habit with me. It is not true that I decided not to use the letters after I talked with Mr. Cooper. I don't think I told him of that letter for some time.

(Testimony of A. D. Mackey.)

I phoned over to the Gypsum Company's office and told them I had a letter of introduction but was not physically able to present it. I talked with the young man in the office. I did not get the superintendent. I was not very well after my arrival in Great Falls. Mr. Knode said something to me about the Hanover people going ahead. That discussion came up concerning what position they would be in as a competitor and I recall now that just as I was leaving his office in the afternoon, he spoke, "Are you going to Great Falls promptly?" and I said, "Yes." He says, "Here is a thought,—go Milwaukee from Minneapolis and," he said, "you can stop over at Lewistown and it is only a few miles out, go out and see the Hanover, what they are doing." I said, "I am not interested in what they are doing." Perhaps this conversation came up concerning the Hanover mill in connection with the unwillingness of the defendant to buy my property. It might have been so stated in words during [103] this conversation.

The Riceville mine is located near Riceville, Montana, that is about a mile and a half away. The properties that were leased to the defendant consisted of rights to mine gypsum. The *entire of* the gypsum was in fee simple absolutely. The gypsum beds underlie some of the property. One piece of the property represents the right of way for a wagon road, but there is no gypsum under that. Another piece represents a ninety-nine year lease, but it does not amount to anything. I don't recall any quarter

(Testimony of A. D. Mackey.)

section of land under a ninety-nine year lease. The mill property is located at Great Falls. It is a gypsum mill, the foundations of which are of stone and concrete. It has all the mill machinery inside. It is located upon property leased from the Great Northern Railway Company. That mill is an important part in operating the properties of the company. It is operated as a gypsum mill.

(Witness excused.)

(Plaintiff rests.)

DEFENDANT'S CASE.

Testimony of O. M. Knode, for Defendant.

O. M. KNODE, a witness sworn on behalf of defendant, testified as follows:

Direct Examination by Mr. MACLEISH.

My name is O. M. Knode. I reside at Chicago, Illinois. I am one of the vice-presidents of the United States Gypsum Company and manager of its operations. I have been actively engaged as manager of operations of defendant about ten years and during that time I have had negotiations with the Mackey Wall Plaster Company. [104]

I made the original investigation of the Mackey property with Mr. Mackey in March, 1909, and the lease was then made later by Mr. Avery, and, at the end of the first year, it was renewed by Mr. Avery and myself, and since that time I have handled the matter entirely for the company with Mr. Mackey.

The property of the plaintiff consisted of first,

(Testimony of O. M. Knode.)

what is known as a two-kettle gypsum calcining mill located on lands owned by the Great Northern Railroad across the Missouri River; it is a frame building on concrete, stone and brick foundation; one and two-story building, contains the usual plaster mill machinery for manufacturing plaster or parts.

That is the point where the rock is ground and actually manufactured into finished products.

The mining property consists of, I think it is, 240 acres of mineral land, that is to say, the mineral rights were in the Mackey Wall Plaster Company. The mine itself consisted of an open cut or tunnel, in fact there were three tunnels, the first two failed, the gypsum gave out as the workings were carried under the mountain. There was also a right of way connecting the mine with the Great Northern Railroad track.

It was supposed to be a wagon road, but it was laid out on quarter section lines, or section lines, and which carried it down through valley gullies which were so rough that it would be impossible for them to be used for that purpose; it also included the right to the 160 acres which Mr. MacLeish mentioned. I refer to the 160 acres about which you have just asked Mr. Mackey. That is held under a 99-year lease. [105]

That was located north of the other properties about a mile on Belt Creek. This lease carried the privilege to the Mackey Company to erect a mill, and to use it for all other purposes excepting agricultural.

(Testimony of O. M. Knode.)

The mill and the mill site are a substantial part of the properties. I refer to the mill and mill site at Great Falls on the leased property. They were the physical part that was most valuable, for without the mineral, were virtually valueless.

Mr. Nold and I negotiated the last extension on July 6, 1915. These negotiations were had at the Rainbow Hotel in Great Falls where we met Mr. Mackey at the time. We gave Mr. Mackey a complete and detailed report of the exact physical condition of the entire property. In substance, the physical conditions were, the factory itself was in good condition; the mine was in such condition that we were fearful that we could not find enough rock to operate the property through another year, or, at most, longer than a year. The various tunnels and workings had encountered a fault, in fact, the fault had been encountered about two years prior to that time. A fault is a condition in a mine where some foreign matter has been thrust into the deposit, eliminating or removing or destroying the mineral, in this instance gypsum.

The deposit where it was opened is nearly fifteen feet thick. At the working faces, as they existed in July, 1915, the face averages from four to five feet and in many places was as low as three feet, and some places had pinched out entirely. The seam was pitching towards the working faces and away from the opening, and in many places, the grade was so great that it was impossible to haul the rock out with any means at hand or to put in equipment to take it

(Testimony of O. M. Knode.)

out at a reasonable cost. The entire situation was explained [106] to Mr. Mackey by Mr. Nold and me, as we had visited the mine the day before we met Mr. Mackey. Mr. Nold is the general superintendent of the company and also the chief engineer of mines.

At that time there was a discussion concerning the prospecting for gypsum in that locality and we told Mr. Mackey that if he cared to renew the lease for another year, that we would prospect further in the Riceville Mine in an effort to get through the fault, and also that we would look into the Albright gypsum and endeavor to get a tunnel through from Albright to the Mackey property and do everything in our power to make the Mackey mine a workable property. Following this conversation the extension agreement was signed up. The defendant during the period of that extension did prospecting work. We drove the tunnels forward in the best places in the fault, in fact, in all of the places that were then open, in an endeavor to get through, but found that they pinched out entirely, or became so thin that it was impossible to work them without a very high cost. We took up through Mr. Cooper the question of securing a lease from Mr. Albright. He brought about a tentative arrangement that was satisfactory to us, but our workings in the Mackey property towards the Albright property gave out, as had the rest of them, and it developed that it was impossible to drive a tunnel through to join the Mackey property. Further investigation of the Albright

(Testimony of O. M. Knode.)

gypsum showed that it was merely a fringe on the side of a hill and that the quantity was negligable. These facts were made known to Mr. Mackey in Chicago, April 28th, 1916.

I am the person who wrote the letter to Mr. Mackey of April 19, 1916. Following that I received a reply from him dated April 22, 1916; I replied to that letter by a letter addressed to Mr. Mackey dated April 24, 1916. Letter of [107] April 22, 1916, and copy of letter dated April 24, 1916, referred to by witness were identified by him and introduced in evidence as Defendant's Exhibits "A" and "B," which were read to the court and are as follows:

Defendant's Exhibit "A"—Letter, April 22, 1916, Mackey to Knode.

Minneapolis, Minn., Apr. 22d, 1916.

My dear Mr. Knode,

"Your letter was mailed to '1224 Chestnut Ave.' and so was delayed in reaching me.

"My wife has recently lost her only sister—and at present she herself is not at all well—and I feel that I should not leave her just now, but if you are to be in your office next week Thursday, the 27th, I will see you then if wife is no worse."

Very truly yours,

(Sgd.) A. D. MACKEY.

Please wire me.

Defendant's Exhibit "B"—Letter, April 24, 1916, U. S. Gypsum Co. to Mackey.

April 24, 1916.

Mr. A. D. Mackey,
Maryland Hotel,
Minneapolis, Minn.

Dear Sir:

"Your letter of the 22d at hand.

"We would prefer to have you come in, so as to be here on Friday, if you can arrange it.

"Mr. Nold will be out of town until Friday morning and I should like to have him here to talk to you regarding the condition of the Riceville Mine."

Yours very truly,

(Sgd.) UNITED STATES GYPSUM CO.
By O. M. KNODE,
Manager of Operations.

OMK.S. [108]

Following the letter of April 24, 1916, Mr. Mackey came to Chicago. He arrived on Friday, April 28th. Mr. Mackey came to the office about 9:30, sent in his name, and I told the office boy to bring him in, and, at the same time, asked Mr. Nold to come in. Mr. Mackey arrived first and I shook hands with him and asked him how he was. While I was doing that, Mr. Nold came in and he spoke to Mr. Nold and they both took chairs and sat down. I said, "Mr. Mackey, I have asked you to come down here to explain to you why we have decided not to take your property, not to exercise our option. We have been prospecting industriously since I saw you last; we have had Mr.

(Testimony of O. M. Knode.)

Shoemaker, our mine superintendent, working on the Albright property in the Riceville Mine, and he has done everything possible to locate gypsum at Riceville, if it is there, and he has failed utterly, and we are convinced that it is not there. We have looked over the other available deposits in Montana and there isn't one that offers a source of supply for your mill, and we have, therefore, concluded to turn your mill back to you when the contract expires. In reply to that Mr. Mackey said, "Well, what is the matter with the Albright property?" "There is gypsum there showing the outcropping." I said, "Yes, Mr. Mackey, it does show, but it is merely a fringe, at its greatest width it is not much over 100 feet wide and that isn't enough to warrant the expenditure of the money necessary to open it up." He said, "Mr. Cooper got you the lease with Mr. Albright?" I said, "Yes, Mr. Cooper got the terms of the lease, made them satisfactory to us, but we never exercised the lease, or entered into it, because there was nothing to be gained, in view of the fact that the quantity of gypsum is not sufficient to warrant opening up." I said, "Furthermore, the Hanover people, whom I wrote you about last [109] December, have come into the territory actively, they are building a mill, and that introduces new competition which materially alters the situation and makes the territory less attractive to us." And Mr. Mackey said, "Well, they won't ever amount to anything; there is no gypsum at Lewistown." I said, "Well, Mr. Mackey, we have had a man at Lewiston since late in December; we have taken an option on a piece of property, and

(Testimony of O. M. Knode.)

have drilled, and while it is true we haven't found any gypsum, the Hanover people have what is reported to us to be a very excellent deposit of gypsum, with large croppings on the surface and with perhaps two hundred thousand tons entirely uncovered and exposed ready to be taken into a mill, which can be located within 500 feet of the main line of the Milwaukee and the Great Northern. If their deposit is what it is reported to be, they have every advantage over you in your situation, because they can take their gypsum to the railroad for little or nothing."

Mr. Mackey asked a number of questions which I answered, and, finally he said, "Well, Mr. Knode, if you won't take the property, what will you do, what can you do?" I said, "Mr. Mackey, there is only one thing that we are willing to do and that is to continue the lease for an indefinite period on such terms that we can retire from the property whenever the gypsum becomes exhausted, or is exhausted to such an extent that we cannot operate it to advantage, or at a profit." "Well, what do you mean by that? What kind of terms have you in mind?" he said. I said, "The only thing we would consider would be a short term lease, or a lease for a specific term, say a year, subject to a cancellation clause of perhaps thirty days, or might make it a little longer than that, it might be too short, but a lease that would let us get out as soon as we couldn't secure the gypsum." [110]

Mr. Mackey asked about the brands that we were manufacturing. "Are you making my old quality brand?" I said, "Yes, we are still manufacturing

(Testimony of O. M. Knode.)

that and we are also manufacturing ivory and alabaster." And he asked what percentage of the different brands we made. I said, "We don't know, depended on what the customer wanted; if they wanted quality, that is what we furnished." He then asked if we had any of his jute bags left that he had sold us. I said, "Yes, I thought we had five or ten thousand, which we would sell him back again in accordance with the terms of the original contract." Mr. Mackey asked if we would put our lease proposition in writing. I said, "Yes," and just exactly what we would do in the matter of terms is something that I haven't decided as yet, something I would want to talk over with the other members of the company, but generally speaking, what I have said to you is the terms under which we would go ahead with the proposition. He said, "Well, I wish you would put that in writing and I will go out to Great Falls; I can't go for a few days, because Mrs. Mackey is sick." I further said to him, "I will let you know what I decide to do." He said, "I will have to have a letter of introduction to your Superintendent; he won't let me in if I don't have it." I said, "All right, Mr. Mackey, I will be glad to give it to you." This last-mentioned conversation was in my office in the afternoon after he had returned from lunch with Mr. Nold. Between the morning and the afternoon conference Mr. Mackey went out to lunch with Mr. Nold and returned with him. Mr. Nold remained in my office throughout the entire day during the conference with Mr. Mackey. During the conference I asked Mr. Mackey what information they

(Testimony of O. M. Knode.)

had gathered through their examination of the government folio, which Mr. Mackey had stated he had in his possession, and his answer to [111] that was that Mr. Nold apparently did not think very much of the Government's engineer's report on the gypsum formation at Riceville. Mr. Nold spoke up and said, "No, if that engineer was writing the gypsum report of the Riceville section at this time, it would read differently, because the Mackay *working* are now there and disclose new information, and because other openings have been made in an effort to discover gypsum, and he would have more information." During the afternoon the lease was mentioned again and I repeated that I would take it up and write Mr. Mackey within a short time stating exactly what we would do or giving him our exact offer for a renewal of the lease. During the conference Mr. Mackey requested that he be given letters of introduction to the Superintendent of defendant. I said, "Yes, Mr. Mackey, I will be glad to give you the letters," and rung my bell for the stenographer, whom Mr. Mackey has described as a page, and he came in with his book and I dictated the two letters to Mr. Marquardt at that time in Mr. Mackey's presence, and also Mr. Nold's. Mr. Nold was present at all times. Witness was shown copy of letter dated April 29, 1916, addressed to G. W. Marquardt, superintendent, Great Falls, Montana, and asked if that is the letter which witness dictated in the presence of Mr. Mackey. He replied that it was the letter and that he sent the original letter to Mr. Mackey, Mary-

land Hotel, Minneapolis, together with a letter to Mr. Mackey. Witness identified the two letters and the same were introduced as the Defendant's Exhibits "C" and "D."

Defendant's Exhibit "C"—Letter, April 29, 1916, Knode to Marquardt.

April 29, 1916.

C. W. Marquardt, Supt.,
Great Falls,
Montana.

Dear Sir: [112]

"This will introduce Mr. A. D. Mackey, owner of the mill at Great Falls and the mine at Riceville, which we are operating.

"Please extend every courtesy to Mr. and Mrs. Mackey, and their attorney, Mr. Cooper, and permit them to examine the mill and mine in as great detail as they desire.

"Do everything you can to assist them."

Yours very truly,

OMKS.

Defendant's Exhibit "D"—Letter, April 29, 1916, Knode to Mackey.

April 29, 1916.

Mr. A. D. Mackey,
Maryland Hotel,
Minneapolis, Minn.

Dear Sir:

"Herewith I hand you letter of introduction to Mr. Marquardt, our Superintendent at Great Falls,

which will serve as your permission to go thru the mill and mine."

Yours very truly,

OMK.S.

I dictated these two letters in the presence of Mr. Mackey and Mr. Nold. Witness was shown a letter dated at Chicago, April 29th, 1916, and stated that this was the other letter dictated in the presence of Mr. Mackey, and was sent to the superintendent of defendant, Mr. Marquardt, at Great Falls. Letter identified and offered in evidence as Defendant's Exhibit "E." [113]

Defendant's Exhibit "E"—Letter, April 29, 1916, Knode to Marquardt.

Chicago, April 29, 1916.

Mr. A. D. Mackey.
G. W. Marquardt, Supt.,
Great Falls.

"Mr. A. D. Mackey, owner of the property at Great Falls and Riceville, will visit you in the course of the next week or ten days, with a view to looking over the property, to determine what course of action he will take, and whether or not he will renew the lease with us.

"The time expires on the fifth day of July. At this time, if the lease is not renewed, we will withdraw from the property.

"We want you to continue operating the mill just as though it was going to operate for an indefinite length of time, except it will be well for you to let your stocks run down.

(Testimony of O. M. Knode.)

"We will probably decide within the course of three or four weeks whether or not we are to continue the lease. In any event, we want you to feel that we are going to take care of you, no matter what the decision may be with reference to the lease. We want you to go ahead with full knowledge that you are not going to be out of a job in the event the lease is not renewed.

OMK.S."

I mentioned Mr. Cooper in this letter for the reason that Mr. Mackey asked me to include Mr. Cooper and Mrs. Mackey so that they could be taken through the property [114] also. As before stated, Mr. Nold was present during the whole of the conversation between Mr. Mackey and me, both in the morning and in the afternoon.

After I stated to Mr. Mackey that the defendant would not buy the property of the Mackey Wall Plaster Company, he first inquired about the gypsum deposits and we described our efforts since we had seen him last to find the gypsum and he said, "Well, I am sure the gypsum is there, and I am confident that I can find it, and I shall have to operate the property myself." That was after the discussion concerning the making of a new lease. After this conversation he enquired about the bags, the tags, the brands and the general situation in Montana, and talked along as to how he would operate the property said that he wasn't an old man yet by any means, described what he would do. After about ten minutes of that, he changed the subject slightly by say-

(Testimony of O. M. Knode.)

ing, "I don't want to operate that property, what can you do? What will you do, Mr. Node?" I said "Mr. Mackey, there is only one thing that the company can do and is willing to do, and that is to continue the present arrangement with the view to finding gypsum." Following this Mr. Mackey said, "Well, under what terms would you continue?" I said, "We haven't considered that matter particularly, Mr. Mackey; I would have to think that over, but, in general, we would renew the lease in its general terms but for a short period and with the privilege to us of canceling on short notice when the mineral showed signs of exhaustion; my idea of the cancellation of the paper would be about thirty days." Mr. Mackey said that would be entirely too short. I said, "Well, we might make that sixty or ninety, it would not be material, but it must be a short cancellation clause." [115] Following this Mr. Mackey said, "I wish you would think over what sort of a proposition you will make me in the way of a lease and put it in writing and send it to me and I will go to Great Falls and look into the situation, and I would like to have that proposition there, so that I can decide what to do, and after I have gone into the thing, I will give you my answer."

There was nothing said at any time during the conversation with Mr. Mackey about sending a formal written notice by May 4th or 5th notifying the Mackey Wall Plaster Company that the defendant would not purchase his property. Mr. Mackey had, by his conduct throughout the conversation, indi-

(Testimony of O. M. Knode.)

cated that that matter was settled and took up the question of our keeping the property on a lease. Mr. Mackey did not at any time during our conversation question the sufficiency of the notice or the letter of April 19, 1916. Mr. Mackey did not at any time say anything that would lead me to believe that he questioned the information or notice contained in the letter of April 19, 1916, or the statement made by me that the company would not purchase his property. I did not write anything on a pad of paper during the time he was talking to me. I know Mr. Cooper very well, have known him for about a year in person but had known him through contracts and through his connection as secretary of the Mackey Co. I talked of him with Mr. Mackey a great many times. I knew his full name and where he resided. Idid not have any telephone conversation or receive any telephone message from Mr. Mackey after he left my office on the afternoon of April 28, 1916, concerning any letters of introduction to the superintendent. Mr. Mackey left my office about four o'clock and I left my office within a very few minutes thereafter. I went home and [116] did not return to my office that evening. Mr. Nold was in my office when Mr. Mackey left. After Mr. Mackey was in my office on April 28th, I wrote a letter to the Mackey Wall Plaster Company. Witness identified a copy of this letter and the same was introduced and read in evidence as Defendant's Exhibit "F."

Defendant's Exhibit "F"—Letter, May 11, 1916, U. S. Gypsum Co. to Mackey.

May 11, 1916.

A. D. Mackey, President,
Mackey Wall Plaster Company,
Great Falls, Cascade County, Montana.

Dear Sir:

"We wrote you on April 19th last that we would not purchase the property under the agreements made on June 15, 1909, and July 1, 1910, between Mackey Wall Plaster Company, A. D. Mackey and Myra Post Mackey, lessors therein named, and the United States Gypsum Company, lessee therein named, following which we conferred with you, at which conference we advised you of our decision not to purchase the said property or to exercise the options contained in said agreements.

"With further reference to our conversation regarding your property at Great Falls and Riceville, Montana, we wish to say that in view of the difficulties connected with the mining operation at Riceville and other conditions which have entered into the situation since our renewal of the contract last July, we are unwilling to purchase the said property mentioned in said agreements under the terms contained therein. [117]

"We are willing, however, to enter into an extension of these contracts, whereby all of the provisions thereof are extended for an indefinite term, or, if you prefer, the contract can be extended for the term of one year subject to cancellation upon sixty

(Testimony of O. M. Knode.)

days' written notice given by us to you of our intentions to terminate the same, rental to be payable monthly in advance, instead of yearly as heretofore."

Very truly yours,
UNITED STATES GYPSUM COMPANY.
O. M. KNODE,
Manager of Operations.

OMK.S.

Mr. Mackey did not reply to this letter. Except for the letters of introduction no letters were written by me or the defendant to Mr. Mackey or the plaintiff and no letters were written by Mr. Mackey or the plaintiff to me or the defendant after our conversation of April 28, 1916, and prior to May 11, 1916. A letter dated May 12, 1916, from the Mackey Wall Plaster Company to the United States Gypsum Company and a letter dated May 17, 1916, from the United States Gypsum Company to A. D. Mackey and a letter dated May 25, 1916, from the United States Gypsum Company to A. D. Mackey, and a letter dated June 8, 1916, from the United States Gypsum Company to the Mackey Wall Plaster Company were exhibited to witness and identified by him and were introduced in evidence and read to the court as Defendant's Exhibit "G."

(Exhibit "G" read to the Court is as follows:)

[118]

Defendant's Exhibit "G"—Letter, May 12, 1916, Mackey Wall Plaster Co. to U. S. Gypsum Co.

COOPER, STEPHENSON & HOOVER,
Attorneys at Law.
Great Falls, Montana, May 12th, 1916.

United States Gypsum Company,
205 W. Monroe St.,
Chicago, Ill.

Gentlemen:

"Since you did not give notice in writing to any of the undersigned of at least sixty days before the first day of July, 1916, of an intention not to purchase in accordance with the provisions of the agreement between you and the undersigned, dated July 6, 1915, and have therefore elected to purchase the property described in and upon the terms and conditions of the several contracts existing between you and the undersigned dated respectively June 1, 1909, July 1, 1910, and July 6, 1915, it has occurred to us that possibly you might wish to consummate the purchase by receiving the formal conveyances, necessary in the premises, before the time stipulated in the contracts. If this should be your desire we shall be glad to conform thereto."

Very truly yours,
MACKEY WALL PLASTER COMPANY.
By (Sgd.) A. D. MACKEY, Pres.
A. D. MACKEY.
MYRA POST MACKEY.
By RANSOM COOPER,
Attorney in Fact. [119]

Defendant's Exhibit "G"—Letter, May 17, 1916, U. S. Gypsum Co. to Mackey.

May 17, 1916.

Mr. A. D. Mackey, President,
Mackey Wall Plaster Company,
Great Falls, Cascade County, Montana.

Dear Sir:

"We are in receipt of your favor of the 12th instant, signed by the Mackey Wall Plaster Company, A. D. Mackey and Myra Post Mackey, and are certainly surprised at its contents.

"You said we did not give notice of our intention not to purchase, to either the Mackey Wall Plaster Company, A. D. Mackey or Myra Post Mackey, at least sixty days before July 1st. The fact is, that on April 19th last we wrote you, that we would not purchase your properties, following which we conferred with you on April 22nd, when it was fully stated to you by us, that we would not purchase the same. You not only understood that we would not purchase, but at that time, accepted the situation, and entered into negotiations for a new lease at the end of the present term.

"Under these conditions, it could not have occurred to you, as stated in your letter, that we might wish to consummate the purchase, but on the contrary, you knew when your letter was written, that we had notified you fully of our intention not to purchase. Our letter to you of May 11th last, containing the proposition mentioned when you were here, probably passed yours of the 12th in the mail,

and we would be glad to hear from you in answer thereto."

Very truly yours,
UNITED STATES GYPSUM COMPANY.

_____,
Manager of Operations.

OMK.S. [120]

Defendant's Exhibit "G"—Letter, May 25, 1916, Knode to Mackey.

May 25, 1916.

Mr. A. D. Mackey,
Riceville,
Montana.

Dear Sir:

"We have not heard from you in reply to our letters of May 11 and 16th.

"It occurred to us that these letters may not have reached you and we are, therefore, mailing you copies to Riceville, where we are informed you are staying at the present time, and also to your Minneapolis address."

Yours truly,

OMK.S.
6/5.
Copy to
Mr. A. D. Mackey,
Maryland Hotel,
Minneapolis, Minn.

Defendant's Exhibit "G"—Letter, June 8, 1916, U. S. Gypsum Co. to Mackey Wall Plaster Co.

June 8, 1916.

Mackey Wall Plaster Company,
A. D. Mackey and Myra Post Mackey,
Great Falls, Montana.

Dear Sirs:

"We have your favor of the 29th ult. and cannot agree with you that you are justified in the course you have taken.

"You attempt to justify your position by the statement, that until we released ourselves from having the right to purchase the property by some act or omission you could not be released. It is difficult for us to see how we could have done anything more to preclude ourselves from having the right to purchase the property. As heretofore [121] stated, we advised you of our intention not to purchase on April 19th, 1916, and at a conference had with Mr. Mackey on April 22nd following we not only advised you that we would not purchase, but Mr. Mackey accepted the notice as final and entered into negotiations with us for a further lease of the premises. We can only conclude that your repeated statement, that you now seek to hold us to a purchase of the property because we did not release you, is not made in good faith, but for the purpose of attempting to justify your most unreasonable and unwarranted position.

"You call attention to the modification of the con-

tract of July 6, 1915, providing that notice of an intention not to purchase would be sufficient if deposited in the mails addressed to you at the city of Great Falls, County of Cascade, State of Montana, and say that we fully understand that this was not done. It is true our letter of April 19th was addressed to Mr. Mackey at 1224 Chestnut Street, Minnesota, but that he received the letter, cannot be denied. The notice, of which you speak, was sufficient if deposited in the mails addressed to either of you, and it is hardly fair for you to say, that our letter did not accomplish the purpose because it was not sent in compliance with the provisions of the contract. That is was not intended as notice of our intention not to purchase, as stated by you, is contrary to the expressed intent of the letter, and, if there could be any doubt as to this, it was made clear at our conference with Mr. Mackey on April 22nd.

"When Mr. Mackey left Chicago he had no intention other than to take up the question of the terms [122] of a new lease, and the position which you have since taken is not only a surprise to us, but seems to be an unwarranted attempt by you to insist upon a purchase of the property when you know that no such purchase was in fact made.

"In view of your attitude, we have turned the entire matter over to our attorneys, Messrs. Scott, Bancroft, Martin & Stephens, 1620 Corn Exchange Bank Building, Chicago, Illinois."

Very truly yours,

UNITED STATES GYPSUM COMPANY.

(Testimony of O. M. Knode.)

In this correspondence the conference between Mr. Mackey and me is referred to as having taken place on April 22d, 1916. That is a mistake, the conference was had on April 28th, 1916. Following the correspondence heretofore mentioned, I sent a letter dated July 9, 1916, to the Mackey Wall Plaster Company and also a letter to that company dated July 11, 1916, and also another letter to that company dated July 20, 1916. Defendant offered these letters in evidence as Defendant's Exhibit "H." These letters had reference to the counterclaim of defendant set forth in its answer and the introduction in evidence of these letters was objected to by plaintiff on the ground that the same are irrelevant, incompetent and immaterial, and illustrate no issue. After a talk between the solicitors for the respective parties in the presence of the Court, it was agreed, with the permission of the Court, that the counterclaim of the defendant might be withdrawn without prejudice and defendant did not further insist upon the introduction of the three letters mentioned in evidence. It was thereupon stipulated by the solicitors **[123]** of the respective parties with the consent of the Court that the copy of the lease attached to Plaintiff's Exhibit One is a true copy of the lease between the Great Northern Railway Company and the Mackey Wall Plaster Company. Witness Knode further testified that the lease dated June 22, 1908, between the Great Northern Railway Company and the Mackey Wall Plaster Company provides, among other things, that the lessee shall

(Testimony of O. M. Knode.)

not and will not assign the lease or permit any other person or corporation to occupy or use any part of the demised premises without first having obtained the written consent of the lessor, its successors or assigns thereto and that the defendant had not received any such consent from the Mackey Wall Plaster Company or from anyone else.

Cross-examination by Mr. COOPER.

I wrote the letter hereinbefore referred to dated April 19, 1916. At the time I wrote that letter I was under the impression that the defendant had until May 5th to give the formal notice therein referred to. I do not recall when that impression was removed from my mind but it was subsequent to May 5th. I dictated that letter of May 11th and then talked the matter over with the attorneys of the defendant. I intended that letter of April 19th to be a formal notice that the defendant had elected not to purchase the property of plaintiff. I used the expression in the letter "except to give you formal notice on May 5th that we do not care to purchase your property" as information to Mr. Mackey in the event that he did not come to Chicago.

Q. Why didn't you say that then?

A. Because that last paragraph was put there with that thought in mind. **[124]**

Q. With what thought in mind?

A. That if Mr. Mackey was to come to Chicago, and talk over the matter, or a formal notice would be sent, that is exactly what I had in mind.

(Testimony of O. M. Knode.)

As a business man I am not as exact as a lawyer. I have no trouble in setting forth what I mean in my letters. My purpose in writing that letter was to get Mr. Mackey down to Chicago if he cared to come. I surmised that after the receipt of that letter Mr. Mackey would care to come to Chicago. After Mr. Mackey came to Chicago, Mr. Nold and I reported the conditions of the mining property as it actually existed, but not as dark as we could have reported it. We told him that the Albright property did not have any gypsum in them. We did not make any test on the Albright properties but the development work in the Mackey mine disclosed that the same fault that cut through the Mackey property also cut through the Albright property. When we were seeking to get an extension from the plaintiff in 1915 we were very earnest about getting a lease from Albright. Our purpose of securing a lease of the Albright property was to make an entry into the Albright property so that we would be able to take the Mackey gypsum out through the Albright property.

Q. Now, when you wrote this letter of May 11th, you had then discovered that it would be too late to send a notice on May 5th, hadn't you?

A. If any notice was necessary, but I did not accept for a moment that one was necessary.

I knew that subsequent to May 5th would be too late, that is, that May 6th would be too late. I had in mind the May 5th date by reason of the fact that the original lease expired on July 5th. I made a

(Testimony of O. M. Knode.)

mistake about the date of the [125] expiration of the 60 days' notice clause and that mistake continued up to about May 5th. I did not look at the lease again after Mr. Mackey was in my office.

Q. Now, when you wrote this letter of May 11th,—"We wrote you on April 19th last that we would not purchase the property under the agreement made on June 15, 1909, and July 1, 1910, between Mackey Wall Plaster Company, A. D. Mackey and Myra Post Mackey, lessors therein named, and the United States Gypsum Company, lessee therein named, following which we conferred with you, at which conference we advised you of our decision not to purchase the said property or to exercise the options contained in said agreement." Now, what did you write all that in there for?

A. That was a repetition of the conversation that was held with Mr. Mackey.

The repetition of our conversation in Chicago was made merely for the purpose of making a formal proposition for the lease. The making of this repetition was not absolutely necessary. I do not think I was seeking to make evidence in favor of defendant in writing that letter of May 11th. I had no such intention in mind. I had not made a mistake in respect to giving formal notice to Mr. Mackey. I had given Mr. Mackey notice in writing and he had accepted the notice in our talk. I did not give him a notice in writing and then say to him in the same writing that it was not to be considered as a notice. After our talk in Chicago Mr. Mackey did

(Testimony of O. M. Knode.)

not expect any further notice for the reason that he accepted our notice and left with the definite thought in mind that the Gypsum Co. was through, that it would not buy his property. He did not say so in so many words but his conversation and attitude indicated that. His attitude was more **[126]** than listening to our proposition, it was a definite entering into negotiations for a continuation of the agreement.

Q. Well, then, why didn't you refer to that in this letter of May 11th? You here apparently for the first time make him a proposition in the last clause of your letter.

A. That is almost *verbatim* the proposition I made him when he was in the office.

I testified a while ago that I told Mr. Mackey we were not in a position to make him a definite proposition until we had conferred with our associates.

And I did not make him a definite proposition only in the few brief details which are all that are covered in this proposition,—a year, a ninety-day cancellation clause, a continuation of the old lease, and that is what I said to Mr. Mackey at the time.

Q. What I can't get through my head, Mr. Knode, was why you should so specifically refer to the letter of April 19th and reiterate all about your giving him the notice, when it was so well understood between you that that notice was waived.

A. Well, I was merely putting in writing a resume of the conversation of the 28th.

Q. That is the explanation that you wish to make

(Testimony of O. M. Knode.)

to that. You, your company, entered into negotiations with Albright for the purpose of procuring a lease from Albright, didn't you?

A. Through you, yes, Mr. Cooper.

When the negotiations were about to be consummated to the extent of our getting a lease on the Albright property we discontinued those negotiations and for very good and sufficient reasons. The defendant did not have Mr. Mackey [127] pretty thoroughly in its power. We had loaned him $8,000 the year before and had taken as security in pledge one hundred and ninety-eight shares of his stock in the Mackey Wall Plaster Company. This security was taken about the middle of July, 1915, and at the suggestion of Mr. Mackey. We offered to loan the money to Mr. Mackey and he offered the stock which was then up in the Great Falls National Bank and amounted to all except two shares of the capital stock of the company and we told him that we did not care for all of the stock. We took one hundred and ninety-eight shares.

Q. Yes. Then, as soon as Mr. Mackey notified you of his purpose to take the position that you had elected to purchase this property by your failing,—you then notified him that you were going to sell the stock, didn't you?

By Mr. MACLEISH.—I object to any questions concerning the personal loan that existed between A. D. Mackey of the Mackey Wall Plaster Company I don't think it is proper in this case. The loan, as shown, was one of a personal transaction between

(Testimony of O. M. Knode.)

the Gypsum Company and A. D. Mackey, not even parties to this suit at the present time, either on cross or direct.

By Mr. COOPER.—If the Court please, the witness here has assumed an attitude of fairness, or pretended to assume that attitude, and I want to show the real attitude.

By the COURT.—While it is true that there may be a dual transaction, Mr. Mackey and his wife are apparently the Plaintiff **[128]** in this case, it may not be entitled to much consideration, the Court will allow it to go in under the usual rule; the objection will be overruled and the exception can be noted. If this evidence is entitled to no consideration, the Court will give it none. If the appellate court will be of a different opinion, it will have it before it without sending the case back for trial. It is not so obviously irrelevant or immaterial that the Court would feel that it should be excluded altogether.

A. I didn't have any first-hand knowledge of that. I did not have any first-hand knowledge concerning the sale by the defendant of the Mackey stock. Mr. Fulton, treasurer of the defendant company, wrote the letter relative to that subject. The one hundred and ninety-eight shares of stock we had taken as security for $8,000 were sold for $98 according to my information but I have no first-hand knowledge of that fact. I was out of town at the time and I know of that transaction only in a general way.

I am not a geologist. I have been to the Mackey property at least once every year since the lease has

(Testimony of O. M. Knode.)

been in existence and sometimes twice and I have had the *advise* of Mr. Nold who is a thoroughly experienced mining engineer. My testimony is in part based upon statements made to me by Mr. Nold. That was my object in having Mr. Nold at the conference between Mr. Mackey and me. Mr. Nold was presumed to know more about the mine and the situation that I would. I did not meet Mr. Nold after Mr. Mackey left to go to lunch [129] and before Mr. Nold joined Mr. Mackey. Mr. Nold was present at all times during my conversation with Mr. Mackey. I had Mr. Nold there because the whole question hinged round the finding of gypsum and Mr. Nold had been right in Montana in November, which was six months later than I had been there, he knew more about the situation from that standpoint than anybody else and our object was to tell Mr. Mackey everything we knew about his property, to put him in as good position as possible to go on with the operation of it in the event he decided not to lease to us. We felt very kindly towards Mr. Mackey, and always had, and wanted to do everything we could for him. We wanted to do everything we could for Mr. Mackey.

Q. And you want to go on record now as saying, do you, Mr. Knode, that on April 19th, when you wrote Mr. Mackey that you were going to give him formal notice that you wouldn't take his property, that that was the only notice you ever intended to write him?

A. Unless Mr. Mackey didn't come to Chicago and

(Testimony of O. M. Knode.)

paid no attention to it, as he had to several letters.

I have not stated all that led me to feel that it was necessary to give Mr. Mackey any further notice. The conversation with him lasted all of three hours and a great many things were said during that time which had a bearing upon the impression that I formed of Mr. Mackey's position. I am a busy man and have a great many things on my mind. I do not think that the recollection of Mr. Mackey of that interview is better than mine. I think I would probably carry the details in my mind better than he would because this subject was in my mind at all times and it was not in Mr. [130] Mackey's mind only occasionally. The construction of the Hanover plant was a factor but not a deciding factor in the position of the defendant relative to its purchasing the Mackey property. We did try to persuade the stockholders of the Hanover Company not to construct a plant in Montana and told them of the situation in Montana and what it would mean to them if they were to put a large sum of money in a gypsum plant in Montana due to the fact that the business isn't in this territory. We did not threaten the stockholders of the Hanover Company with grilling competition. We threatened them with nothing.

Q. And didn't Mr. Miracle of that company tell you that he turned your letter over to the Attorney General? A. He may have; I didn't know that.

Redirect Examination.

(By Mr. MACLEISH.)

The loaning of money to Mr. Mackey was a per-

(Testimony of O. M. Knode.)

sonal loan to him and that money was loaned to him for the purpose of enabling him to pay a judgment and to protect his stock. At that time all his stock was put up on a loan and the bank was threatening foreclosure and a sale of his stock and under this condition we loaned him the money.

(Witness excused.)

Testimony of John H. Nold, for Defendant.

JOHN H. NOLD, being duly called and sworn as a witness in behalf of defendant, testified as follows:

Direct Examination.

(By Mr. MACLEISH.)

My name is John H. Nold. I reside in Chicago, [131] Illinois. I am general superintendent of the United States Gypsum Company and also in charge of its mines and quarry operations. I have been in charge of the quarries and mines since 1907. I have been general superintendent about a year and a half. I was not connected with the Gypsum Company prior to 1907. I came to Great Falls with Mr. Knode and met Mr. Mackey and Mr. Cooper and joined in the negotiations concerning the extension of the Mackey Wall Plaster Company lease in July, 1915. At that time I told Mr. Mackey, at Mr. Knode's request, just the conditions that we had encountered in operating his property. The first time the matter was taken up Mr. Mackey, Mr. Knode and I were present in the Rainbow Hotel and later it was all gone over again in Mr. Cooper's office with Mr. Cooper also present. At Mr. Cooper's office I told

(Testimony of John H. Nold.)

Mr. Cooper that we had encountered a fault on the Mackey property; that fault was encountered some time in 1914, as we advanced the workings in under the mountain side, we came to a point where the gypsum strata became thin, then turned down at a very sharp angle, in fact, almost on end, and, as we followed that, it ended. In other words, there was no more gypsum *beyong*. Up to that time, when the workings encountered those conditions, all along the faces we had pushed them ahead a reasonable distance, probably twenty or twenty-five feet, and then discontinued and got gypsum wherever we could along that face elsewhere. I told Mr. Cooper that the only way I knew to tell how wide the fault was, or whether it was the end of the gypsum, whether it was really a fault, was to simply pick out the most advantageous places and drive tunnels through, not in gypsum but in any strata that we encountered, trying to find gypsum *beyong* on the Mackey property. I said, "This will [132] take time; it takes time to drive those tunnels, and, unless we are given time, we will have to quit. If we have a year, we will hae time to drive those tunnels and know more about the presence of gypsum on the Mackey property at Riceville that we know now."

At that time we were trying to go through a fault on the Mackey property and which we found out during operations later in the year was the end of the gypsum deposit. Following this conversation, Mr. Cooper took up the extension, giving us another year to operate the property.

(Testimony of John H. Nold.)

During that year, under my instructions, the tunnels were driven into this sandstone and foreign matter, and, without exception, none of them found any gypsum. In every instance, that was the end of it. Not only was that done, but our mining engineer, who was also in charge of the work out there, Mr. Shoemaker, thoroughly prospected properties around the Mackey property, north of it and east of it, and made thorough report, and I visited there, and went over them thoroughly with him; there was drilling done; there was openings made, and at no place were we able to find gypsum, and, not only that, Mr. Mackey, in July, 1915, seemed to have something up his sleeve as to where there was gypsum.

He did not disclose very much about that to us at the time but I surmised it was around there some place and I thought if it was there, I would beat him to it, so I told Mr. Shoemaker about it and a very diligent search was made all along Belt Creek to find gypsum anywhere, and I visited the property some time in November, 1915, and went over it very thoroughly, I spent over a week there right on the property and the surrounding properties, and, at the time of my visit there, I took into my confidence, or went to Mrs. Rice, the [133] widow of Mr. Rice, after whom Riceville was named, and Walter Rice, and asked them if they knew of any gypsum on Belt Creek.

Everything was done from a mining standpoint to try and discover gypsum at Riceville or around Rice-

(Testimony of John H. Nold.)

ville. The result was that we did not find any gypsum either on the Mackey property or surrounding property. I was present when Mr. Mackey came to Chicago on April 28th, 1916.

On the morning of April 28, 1916, I had returned from the east, at a call from Mr. Knode stating that Mr. Mackey would be there on Friday morning. About some time between nine and ten o'clock, I should say, I was in Mr. Knode's office talking with him when Mr. Mackey was announced. I left the room, Mr. Mackey went in Mr. Knode's room, and my bell rang, Mr. Knode calling me, I followed Mr. Mackey directly into Mr. Knode's room and we shook hands with Mr. Mackey and sat down for a conference.

This was in the morning before lunch. Mr. Knode, Mr. Mackey and I were present. Mr. Knode opened the conversation by telling Mr. Mackey in words something like this: "Well, Mr. Mackey, we have decided not to buy your property; our investigations at Riceville and around Riceville, in fact, all around within striking distance of Great Falls, have not disclosed to us any gypsum deposit that is available for supplying gypsum rock to your mill at Great Falls."

This is about the substance of all that Mr. Knode said and Mr. Mackey replied: "Weren't you able to find gypsum on Rice's property?" Mr. Knode said: "We have not been able to find gypsum anywhere." "Well," Mr. Mackey says, "the gypsum is there all right." Mr. Knode said, "I wish you would tell us

(Testimony of John H. Nold.)

where it is; you haven't told us; we have followed several leads that you gave us without any success." Mr. [134] Mackey says, "The gypsum is there and I can find it, and, if you don't want to operate the property, why, I will operate it." Mr. Knode says, "That is your privilege, of course, to operate the property," and Mr. Mackey asked concerning the business.

Mr. Mackey talked concerning the business and asked what brands of material we were making, he asked whether we had any of his old bags and whether we would sell them to him, and he asked about tonnage and a number of things, and led me to believe, at least, that Mr. Mackey was taking a stand that he was going to operate the property and he talked that way for a while and then he says, "I don't know as I want to operate that property"; he says, "Are you sure that gypsum isn't there?" Mr. Knode assured him again that it wasn't, at least, we didn't know that it was, couldn't find it, and he says, "What will you do with the property, what can you do with the property, what could I do with the property?" Mr. Knode says, "I don't know exactly what can be done with it, it looks almost hopeless to us"; he said, "The only proposition that we would consider at all with your property, would be to continue, as we have been operating it, a sufficient length of time to mine and work through your mill what gypsum there is available or what gypsum we may be able to find as we are operating on that basis." Mr. Mackey asked how long he thought that would

(Testimony of John H. Nold.)

be, how long it would be, and, it was at that time, as I recall, that a blue-print was sent for and brought in. Mr. Knode asked me how much gypsum was there, how long I thought it would operate with the tonnage we were taking out and I said, "We have in sight remaining in the mine in the roof, possibly some in the floor, gypsum to run that plant six months, depending on what success we have in taking this gypsum out, which primarily [135] amounted to robbing the mine." I mean by robbing the mine that in working the mine at first, gypsum was left as a roof, because the strata overlying that was clay, which would fall down, so there were several feet of gypsum left as a roof in the first mining over it, that we found could be taken down to some advantage and reclaimed, because prior to this time we had had considerable trouble getting enough gypsum to keep our plant going from the Mackey mine and some of it had been taken down and used, "but," I said, "you have got to understand that if we operate the mine and take all of the gypsum it will leave the mine in shape so that it never can be entered again," because, as the roof rock is taken down, the strata beyond it falls, it is what holds it up. I said, "We might find gypsum enough to run the plant a year, we might find enough to run it two years, but, at the present time, there is not to exceed six months' supply of gypsum in sight for the Mackey mill." Mr. Mackey did not dispute that but talked about gypsum on Rice's property and all the way around, every place else but his property.

(Testimony of John H. Nold.)

We talked about the Albright property. I claimed to Mr. Mackey again that he must remember that at the time we talked about the Albright property in Mr. Cooper's office, the reason we wanted the Albright property was not because of the gypsum on Albright's, because, even if the gypsum was under the Albright property along the Mackey property, the little fringe of the hillside between the Mackey line and where it would outcrop on Albright is only a small strip of ground and there would be very little there. Our interest in the Albright property was to get an opening, another opening into the Mackey property and I said, "Mr. Mackey, the Albright property does not appeal to us now at all, because you have no gypsum on your property to go after [136] through Albright's; we have demonstrated to our satisfaction, and, I believe, to yours the gypsum does not exist on your property beyond just the small area that we have worked out."

Following the conversation concerning the physical condition of the property, Mr. Knode said that we would work the property, if Mr. Mackey would consent on a lease continuing the way we were on the short-time cancellation and Mr. Mackey says, "Well, you would lease it from year to year, wouldn't you?" "No," Mr. Knode said, "we wouldn't, because there isn't gypsum enough there." "Well," he said, "you would pay me a year's rent, wouldn't you?" "No," Mr. Knode said, "we would pay the rent from month to month and would want to cancel it on thirty-days' notice." Mr. Mackey

(Testimony of John H. Nold.)

says, "that's awful short notice." Mr. Knode said, "Well, we might make that longer, the notice, sixty days, might make it as much as ninety days, but we couldn't possibly even enter into an agreement to operate your property under lease for a year, as much as a year's period." Mr. Mackey took the position that there was gypsum there and argued it. It was lunch-time by that time and Mr. Knode requested that I would take Mr. Mackey out to lunch and Mr. Mackey suggested that we go to lunch, that we go over to his hotel, where he had a government portfolio that disclosed gypsum on Belt Creek. We left the office and started to go to lunch. As I recall, I was detained at my desk, somebody there, or something of that kind, I was detained, expected to be only a few minutes, but it was probably fifteen or twenty minutes. Mr. Mackey went on over to the Morrison Hotel and I followed him and met him in the lobby of the hotel and he took me up to his room; I went up to his room in the Morrison Hotel and he had the Government portfolio, I don't recall the Government geologist who had worked that up, [137] but it was the Fort Benton folio that covered a great deal of territory, but did go into the gypsum deposits of Belt Creek. The folio was quite old, had been written before there had been practically any—before there had been any development of gypsum on Belt Creek and we looked it all over and I said, "Mr. Mackey, if that man had written that book during the last year, it would read entirely different from what it reads now, because he didn't

(Testimony of John H. Nold.)

know anything about it, he just saw a little gypsum here and there, and later developments have shown that what he said were thick veins of gypsum and thin veins of gypsum were not veins of gypsum at all, there were pieces of gypsum on the mountain side but did not extend in under the hill, and, furthermore," I said, "Mr. Mackey, this gypsum that you are looking at and calling the one that you have opened up at your mine is not the gypsum the geologist is talking about at all, because the highest gypsum that he saw above Belt Creek was about four hundred and some feet and yours is over a thousand, so he never got up to yours at all"; and we probably put in twenty to twenty-five minutes just discussing the gypsum and its occurrence there. Mr. Mackey closed the book and said to me, he says, "If your company operate that on *on* a lease, how long do you think that they will operate it?" I says, "Mr. Mackey, that is hard to tell, but I feel sure that they will operate it as long as there is any gypsum there; I don't see why they wouldn't, because we haven't found any other gypsum as close to Great Falls as yours at Riceville." I says, "I am sure it is six months, I believe it will be a year, it might be two years."

This was the conversation that took place in Mr. Mackey's room. After that we went to lunch. To the best of my recollection we did not talk the business question, at [138] least during lunch. Following lunch we returned together to the office, Mr. Knode had not returned from lunch, or his appoint-

(Testimony of John H. Nold.)

ment, whichever it was, and Mr. Mackey sat down in Mr. Knode's office and I went to work at my desk. After some—at least, thirty minutes anyway probably, Mr. Knode came in. Mr. Knode, in passing my desk, asked me to come in his room, and the conference with Mr. Mackey. I then went into Mr. Knode's room and he and Mr. Mackey were present. Mr. Knode asked, "Well, what did you find in the book?" and Mr. Mackey remarked, he said, "Nold doesn't seem to think much about what the Government man says about gypsum," and I said, "no, because, he didn't know, gypsum hadn't been developed at that time and what he says about it in the book is past history, we know more about gypsum on there, the time we have put in at it, and the money we have spent in prospecting and developing than he possibly could have known. Mr. Mackey then asked Mr. Knode what he thought about gypsum from somewhere else, how about gypsum from Geyser, Montana, he knowing that we had tested it, and Mr. Knode told Mr. Mackey that we had made a thorough investigation of the gypsum at Geyser, even to the extent of having a car of it loaded from that deposit and shipped in to the Mackey mill and tested. That gypsum contains oil and salt to an extent that renders it unuseful for plaster products. Mr. Mackey asked how about Lewistown, in around there. He says, "You are prospecting there." Mr. Knode says, "Up to the present time, although we have had a man around Lewistown since the latter part of December, we have been unable yet to find

(Testimony of John H. Nold.)

any gypsum deposit at Lewistown." Mr. Mackey says, "Well, it is mighty bad, but you make a proposition, tell me what you will do." Mr. Knode says, "I can't tell you very well, because it has not [139] been discussed a great deal what we will do, what we are going to do," and Mr. Mackey says, "I am going out to Great Falls and look that thing over thoroughly myself, going out there, I can't go right away,"—he spoke of his wife's illness and I think some other matters, "but I will get out there in the course of ten days or two weeks and look over the matter thoroughly. I am going out to Riceville and live right on that and look at it and you send me out there the best proposition, the proposition that you will make to operate that property and I will consider it. Mr. Knode said he would do that but he said, "We would have to have a pretty prompt answer, because we want to know what we are going to do." And he says, "I will answer it promptly when I get out there." That apparently ended the conference; Mr. Mackey says, "When I go out there, I will have to have a pass to get into your properties and I wish that you would give me a letter to your superintendent so that I can go through the properties." Mr. Knode says, "We will gladly do that," and he rang the bell for a stenographer and the stenographer came in and Mr. Knode started to dictate a letter to the superintendent introducing Mr. Mackey; Mr. Mackey requested, he says, "Make that include Mrs. Mackey and Mr. Cooper," he says, "I may want them to go into this with me." Mr.

(Testimony of John H. Nold.)

Knode says, "I will gladly do that" and he dictated a letter to our superintendent, including those names and requesting him to show them every courtesy, and facilitate them looking at the property. He also dictated another letter to our superintendent, telling him that Mr. Mackey would visit the property some time within the near future.

During this conversation Mr. Knode, Mr. Mackey and I were present and these letters were dictated to stenographer Smith. Mr. Knode also dictated a letter to our superintendent [140] telling him that Mr. Mackey would visit the property in the near future and telling him in the letter, he says, "We don't know how long we will operate at Great Falls, but you are to operate the mill and the plant just as if we were going to stay there right along, keep the property right intact," and in the course of the conversation, in talking about the properties, Mr. Mackey had asked how much material we had on hand in the way of rock and supplies and things of that kind and he had requested that we not stock up on him if he took the property, that is, pile a lot of material up that he would have to buy, and, in the letter that Mr. Knode dictated to the superintendent, he suggested to him, or rather asked him, to let his stocks run down, not order a lot of material in, pending the time that we probably would quit operating.

The witness was then shown a letter marked Defendant's Exhibit "C" and also a letter marked Defendant's Exhibit "E" and stated that these were the two letters dictated by Mr. Knode in the presence

(Testimony of John H. Nold.)

of himself and Mr. Mackey. After these letters were dictated and the stenographer left the room and we shook hands and said goodbye to Mr. Mackey, Mr. Mackey left, I went to my desk and Mr. Knode left the office within not less than a minute and a half after Mr. Mackey left. Mr. Knode did not come back to the office. Mr. Mackey at no time during the conversation questioned the sufficiency or wording of the letter of April 19, 1916. I do not recall that the letter was mentioned at all. There was no question about the notice at all. Mr. Mackey did not say anything about not having received notice of the intention of the Gypsum Company not to buy his property. Mr. Mackey did not at any time during the conversation say that he desired further notice of the intention of the Gypsum Company not to buy the property. During those conferences Mr. **[141]** Knode did not at any time say he would send a formal notice by the 4th or 5th of May or that he would send a formal notice at any time. Mr. Mackey and I left Mr. Knode's office together when we started to lunch. As I passed the clerk's desk, just outside of Mr. Knode's door, he told me there was someone who wished to see me. I excused myself and told Mr. Mackey that I could not go right then. Mr. Mackey went on out and I met him later at the hotel. There was no time during the morning conference when I went out of the office of Mr. Knode.

Mr. Mackey and I came back from lunch together; on reaching Mr. Knode's room, we found he had not returned, and I asked Mr. Mackey to have a chair

(Testimony of John H. Nold.)

and wait in Mr. Knode's room until his return, and I went out to my desk, which is just outside the door of Mr. Knode's room. Some short time later, Mr. Knode came in and passed my desk and requested that I come in the room with him, and I followed him right in the room. I was present from that time until Mr. Mackey left Mr. Knode. I did not observe Mr. Knode at any time write something on a pad and at the end of it say, "Ransom Cooper, Great Falls, Montana," or words to that effect. Mr. Knode did not write anything. I did not have any telephone conversation with Mr. Mackey after he left the office of the Gypsum Company that night. I know that Mr. Knode could not have had any telephone conversation with Mr. Mackey at the office because he was not there.

Testimony of O. M. Knode, for Defendant (Recalled).

Mr. KNODE, recalled on behalf of defendant, and testified as follows:

Direct Examination.

(By Mr. MACLEISH.)

The letters, Defendant's Exhibits "C" and " E," are dated April 29, 1916. I dictated these letters the last thing [142] before Mr. Mackey left and I followed out immediately. The stenographer did not write the letters until the next morning because he knew I could not read and sign them until then. That is the custom of our office. The letters were

(Testimony of O. M. Knode.)

written the following day.

(No cross-examination.)

By Mr. MACLEISH.—If the Court please, there are certain—we have here an Abstract of the Title to this property, made by the Hubbard Abstract Company, which I understand is a certified abstract company, we can offer in evidence the whole abstract, or just such portions of it, read it to the record, but, for the purpose of shortening the record, such portions of it as we desire to call attention to, and, if counsel will consent to my calling attention to those portions, I will offer in evidence the abstract.

By Mr. HOOVER.—We object to the introduction of the abstract, or any portion of it, upon the ground that it is incompetent, *irreletive* and immaterial, as counsel explained what he wished to show there.

By Mr. NORRIS.—On that feature of it, of course, we would be required to call Mr. Hubbard and have him prove that he is a certified abstracter, and has filed a bond required by the State of Montana with the State Treasurer to entitle this abstract to be *prima facie* evidence under the provisions of our statute; if counsel requires that, we can call Mr. Hubbard and show he is a certified and bonded abstracter, and, under the law, the abstract is entitled to be introduced in evidence and has the same force and effect—as if certified copies were introduced.

By Mr. HOOVER.—That was not the point of our objection. [143]

By Mr. NORRIS.—This abstract certifies and purports to be an abstract of the whole title of the prop-

(Testimony of O. M. Knode.)

erty down to December, 1916, which was some time subsequent to this transaction, so that it shows the title of the property up to that time.

By the COURT.—What is the purpose of introducing this abstract?

By Mr. MACLEISH.—To show the following: To show that the title to the land situated in lot seven of section two, township twenty, which is the piece of property called the leasehold and upon which the mill is constructed, that the title to that property is in the Great Northern Railway Company, subject to a mortgage or trust deed of six hundred million dollars to secure a bond issue of equal amount dated May 1, 1911, and subject to the lease given to the Mackey Wall Plaster Company dated June 22, 1908, for a term of ten years—July 1, 1908. That there is no consent on the record in writing, as provided in the lease, consenting either by the mortgagee or by the Railway Company to the assignment of the lease by the Mackey Wall Plaster Company to the United States Gypsum Company or anybody. That is what we desire to show as to the leasehold interest. I have stated, I believe, that that is the piece of property upon which the mill is situated.

We also desire to show by this Abstract that this piece of property known as the ninety-nine year lease, as subject to a tax sale, that part of it is encumbered by a mortgage dated December 5, 1905, recorded December 20, 1905, for the sum of one thousand dollars.

By Mr. HOOVER.—If I may ask, what property

(Testimony of O. M. Knode.)

is that as described in the original contract?

By Mr. MACLEISH.—That is the ninety-nine year lease, [144] part of which those mortgages are—is described as the Northeast quarter of the Northwest quarter of Section 14.

By Mr. COOPER.—Well, who is the property from? Is that the mill site?

By Mr. MACLEISH.—That is property, the title of which is in Villa Clara Albright.

By Mr. HOOVER.—In other words, that is the property described in this agreement as the description "a"?

By Mr. MACLEISH.—It will be that part which you hold by virtue of an instrument from Laura Wilson to A. D. Mackey dated April 11, 1908.

By Mr. HOOVER.—The property described here consists of four pieces.

By Mr. MACLEISH.—You have section fourteen, haven't you? Southwest quarter of section 14?

By Mr. HOOVER.—That is contained then in description "a"?

By Mr. MACLEISH.—Yes. Also for the purpose of showing that upon the northeast quarter of the southeast quarter of section fourteen, there is another mortgage of five hundred dollars from Laura Wilson and Vir Wilson dated November 15, 1905, and recorded December 20, 1905, both of which mortgages ante-date the lease or rights obtained by Mackey and the Mackey Wall Plaster Company.

Also a tax sale.

Also that the title to the west half of the southwest

(Testimony of O. M. Knode.)

quarter of section fourteen is in Laura Wilson, subject to some minor objections which I think perhaps, as far as title are concerned, could be readily cured, but especially subject to a tax sale.

Also that the title to the west half of the southwest quarter of section twenty-three, the title of which is in Mary [145] Rice, subject to a mortgage of May 15, 1907, and recorded May 20, 1907, for a consideration of thirty-eight hundred dollars.

That the title to the southeast quarter of the southwest quarter of section twenty-four and the east half of the northwest quarter and the northeast quarter of section twenty-five is in Thor A. Weggeland, subject to a tax sale.

Those are the questions that we desire to present through this abstract of title.

By Mr. HOOVER.—May it please the Court, we object to the introduction of the evidence upon the ground that it is incompetent and irrelevant and immaterial, and we might just as well point out to the Court now as at any other time what the property is that the Mackey Wall Plaster Company covenanted to convey if this option were exercised. While all of the objections could be met by making the decree conditional upon the execution of proper conveyance and the giving of proper title, for the court to decide what would be the proper title to require of the Mackey Wall Plaster Company, it is necessary to read the covenants. In the original agreement, which is Plaintiff's Exhibit One, the description of the property is as follows: "The follow-

(Testimony of O. M. Knode.)

ing described real estate and mining property, situated in the County of Cascade, State of Montana, to wit: All the right, title, interest and estate of said Plaster Company in and to those tracts of land near the town or village of Riceville, in said County, which are described as follows, The Southeast Quarter of the Southwest Quarter of Section Twenty-four," which is one of the tracts of land attacked, the east half of the northwest quarter and the northwest quarter of the southeast quarter of section twenty-five, township seventeen north, range six east," etc., and, "all the right, [146] title, and interest and estate of said Plaster Company in and to the southwest quarter of said section fourteen," which is the first piece of real estate attacked, title of it is attacked, the same being all of the rights in and title to said several tracts which were acquired by said Plaster Company by and through the conveyance to it of said property by the parties of the second part,—that is, A. D. Mackey and Myra Post Mackey, by a deed bearing date the 16th day of October, 1908, which is of record in the office of the County Clerk and Recorder of Cascade County, Montana, in Book 53, page 332; the certified copy of that deed has been introduced as one of the plaintiff's exhibits. That is the property described in the option.

The option is as follows: "And said Plaster Company, for the considerations hereinbefore recited, does hereby give and grant to said gypsum company, irrevocably, the right and option to purchase of said plaster company, at any time before the expiration

(Testimony of O. M. Knode.)

of said one year term, or, if said one year terms shall be renewed or extended for said five year term, then, at any time before the expiration of said five year term, all the property and property rights therein described, for the sum of fifty thousand dollars," etc.; then, setting forth the terms of the option; "And simultaneously with the making of said cash payment and the execution and delivery of said notes, as herein provided, the said Plaster Company will sell to the said Gypsum Company and convey to it all of the said property and property rights of said Plaster Company by a good and sufficient warranty deed, then to be executed and delivered by said Plaster Company to said Gypsum Company, covenanting therein especially that previous to the time of the execution of the said warranty deed, the said Plaster Company has not conveyed any estate or interest in said property or created [147] therein any property rights in favor of any person other than said *B*ypsum Company, that said property and property rights are, at the time of the execution and delivery of said deed, free from incumbrances done, made or suffered by or through the act of said Plaster Company or any person claiming under it; and that said Gypsum Company shall enjoy said property and property rights without any lawful disturbance by any person or persons whomsoever."

Now, it will be remembered that at the time this lease was made, the property was taken over, the possession of it was taken over by the Gypsum Company and that they were expressly given the right,

(Testimony of O. M. Knode.)

that Company, to pay the taxes, and, therefore, keep the premises free from the lien. Tax sales are referred to in these objections, if they happened before the time of the execution and delivery, there is no showing that that was caused by any act of the Plaster Company, if afterwards, it lay in the power of the Gypsum Company at any time, under the terms of this agreement, to free the property from any delinquent taxes.

As to the lease, the property conveyed is this: "All of the right, title, interest and estate of the said Plaster Company in and to that certain tract of land in and near the city of Great Falls, in said County of Cascade, which is described as follows,"—there giving a description by metes and bounds of the particular tract of land,—"Being all of the rights in and title to said tract of land, which were acquired by said Plaster Company, and through the indenture of lease therefor, which was duly entered into between the Great Northern Railway Company and said Plaster Company on the 22d day of June, 1908, and subject to all of the terms and conditions therein set forth, a true copy of which [148] said Indenture of Lease is hereby attached as part of this Instrument and marked "Exhibit Plant Lease." That lease was turned over to the United States Gypsum Company at the date of the execution of this Agreement and the property has ever since been in their possession under the paramount title of that lease. This first contract provides that the Gypsum Company shall pay the installments of rentals as they be-

(Testimony of O. M. Knode.)

come due under that lease. Then the Conveyance recites just what this description recites, that is, "all the right, title and interest under and by virtue of that lease, all the rights of the Gypsum Company which have been for the last six or seven years—of the Plaster Company, which has been in the Gypsum Company for the last six or seven years will continue throughout the term of that lease, which has, I believe, another year to run. If, however, an assignment of that lease could be asked for in equity and it would seem best to the Court that an assignment should be made, a decree should be made conditional on the obtaining of that from the Great Northern Railway, the assignment of that lease, during the existence of the term. It would seem now the said lease, or assignment under that lease, is sufficient for all purposes, as it has been before. The deed which is in evidence and tendered is in terms exactly as what is called for under this contract and we, therefore, object to the introduction of any evidence attacking the title of the premises or any part, unless it is shown that such defects or objections come within the terms of the original agreement.

By the COURT.—Well, we will receive the evidence, and, if it is not competent, in view of the agreement, why, it will be given no weight, at this time the objection will be overruled and extension noted. [149]

By Mr. MACLEISH.—Shall I read into the record those parts of the abstract—

By Mr. HOOVER.—Might put the abstract in.

(Testimony of A. D. Mackey.)

By Mr. MACLEISH.—I will offer in evidence the abstract as Defendant's Exhibit "I." As I take it, the question of the Hubbard Abstract Company being a certified company under the laws is waived?

By Mr. HOOVER.—Yes, sir.

(The defendant rests.)

REBUTTAL.

Testimony of A. D. Mackey, for Plaintiff (Recalled in Rebuttal.)

A. D. MACKEY, recalled as witness in behalf of plaintiff in rebuttal, testified as follows:

Direct Examination.

(By Mr. COOPER.)

I came to Great Falls soon after I had met Mr. Knode in Chicago. I consulted an attorney about the situation I was in. I showed my attorney the letter of April 19th.

Q. What did you tell him with respect, if anything —what did you tell your attorney?

By Mr. MACLEISH.—I object to that question, if the Court please, conversation between Mr. Mackey and his attorney not in the presence of the defendant.

By the COURT.—Objection sustained.

There is nothing further that I wish to state concerning which the testimony of Mr. Knode and Mr. Nold has [150] refreshed my memory.

(Witness excused.)

(Plaintiff rests.)

It was thereupon agreed by the solicitors of the respective parties, with the consent of the Court, that verbal argument to the Court be waived and that the case be submitted to the Court on brief. It was further agreed that the brief on behalf of defendant be first submitted. It was further agreed that for the purpose of shortening the record that certain exhibits introduced in evidence may be omitted from a transcript of the testimony for the reason that the same are set forth in the pleading as follows: Exhibit No. 1 of plaintiff is the same as exhibit "A" attached to the answer of defendant; exhibit No. 2 of plaintiff is the same as exhibit "B" attached to the complaint of plaintiff; exhibit No. 3 of plaintiff is the same as exhibit "A" attached to the complaint of plaintiff; exhibit No. 4, the letter of April 19, 1916, is the same as exhibit "C" attached to the complaint.

Thereafter and within the time provided for by stipulation the solicitors of the respective parties filed their briefs with the Court and the Court being fully informed in the premises on July 27th, 1917, made and filed herein its decision of which decision the solicitors of the respective parties were duly informed.

On Aug. 8th, 1917, the solicitors of the plaintiff made, served upon the solicitors of defendant and filed herein notice as follows:

You and each of you will please take notice that the plaintiff above-named has obtained the consent of the Great Northern Railway Company to an assignment of the lease mentioned in the complaint in

the above-entitled action, which consent is hereto [151] attached and herewith deposited in court pursuant to the decision of the Judge of the above-named court filed July 27, 1917; and that plaintiff is in all else ready and able to perform the terms and covenants in said agreement contained, and has complied with all the conditions required of it by said decision. And

YOU ARE FURTHER NOTIFIED

that upon Tuesday, the 4th day of September, A. D. 1917, at 10:00 o'clock A. M., or as soon thereafter as counsel can be heard, at the courtroom of this Honorable Court, at Great Falls, Montana, we will present to the Court for signature the decree in the above-entitled action, a copy of which is hereto attached, when and where any objections to the granting of said decree, if any, may be submitted for determination by you or any of you.

Dated this 8 day of August, A. D. 1917.

On August 31, 1917, the solicitors of defendant gave, served upon the solicitors for plaintiff and filed notice as follows:

You and each of you will hereby take notice and be informed that at the courtroom of the United States District Court at Great Falls, Montana, on the 4th day of September, 1917, on the opening of court on said day, which according to practice is at the hour of ten o'clock in the forenoon, the above-named defendant will move the above-entitled court for rendition of a decree in the above-entitled cause in favor of the plaintiff. This motion will be made

and passed upon on the papers, records, files and minutes of court in said cause.

Dated this 31st day of August, 1917.

On Sept. 4th, 1917, before the above-entitled court at Great Falls, Montana, this matter came on for further hearing, the solicitors for the respective parties being present in court.

Mr. HOOVER, for Plaintiff.—This the time set in the notice for presenting the decree for signature, a copy of which has been [152] served. The consent of the Great Northern Railway Company is attached to the original notice which has been filed.

The notice referred to by counsel was and is in the following words:

The Great Northern Railway Company, the lessor in that certain lease entered into between it as lessor and the Mackey Wall Plaster Company, as lessee, on the 22d day of June, 1908, in and by which the said lessor did lease to said lessee certain property near its right of way in the city of Great Falls, county of Cascade, and State of Montana, does hereby consent to the subleasing of said premises by said lessee to the United States Gypsum Company, its successors and assigns, and does likewise consent to the granting by said Mackey Wall Plaster Company to said Gypsum Company of an option to purchase all the rights of said Mackey Wall Plaster Company under and by virtue of said lease first above mentioned and to the assignment of said least first above mentioned by said Mackey Wall Plaster Company to said Gypsum Com-

W. W. B.
C. H. B.

pany, its successors and assigns, if the same shall be purchased pursuant to said option.

GREAT NORTHERN RAILWAY COMPANY.

By R. I. FARRINGTON,
Its 2d Vice-President.

Thereupon the solicitors for the defendant presented to the Court and filed motion in behalf of defendant for a decree in said cause in words as follows:

Motion of Defendant for Decree.

Now comes the United States Gypsum Company, a corporation defendant in the above-entitled cause, and moves the Court to deny the motion of the plaintiff herein for a decree in said cause, and to enter a decree for the defendant in said cause for the following reasons:

1. For the reasons presented to this Court upon the trial and argument of said cause, and in the written briefs filed herein on behalf of the said defendant to the effect:

(a) That the equities are with the defendant; [153]

(b) That the letter of April 19, 1916, to A. D. Mackey introduced in evidence herein was a sufficient notice in writing of the intention of the United States Gypsum Company not to purchase the property of The Mackey Wall Plaster Company;

(c) That the conduct of A. D. Mackey at the meeting of April 28, 1916, and the negotiations

thereat entered into between the parties for a new lease were inconsistent with the requirement for notice, that the United States Gypsum Company would not purchase the properties of The Mackey Wall Plaster Company, and operated as a waiver of any such notice and an estoppel upon The Mackey Wall Plaster Company to claim that it was entitled to any such notice;

(d) That the Mackey Wall Plaster Company received notice of the intention of the United States Gypsum Company not to purchase the property of The Mackey Wall Plaster Company by the letter of May 11, 1916, which was a substantial compliance with the terms of the contract under the circumstances as they then existed;

(e) That the contract of June 15, 1909 cannot be specifically enforced in equity at the suit of either the plaintiff or the defendant and the bill must therefore be dismissed; and

(f) That the plaintiff had failed to deliver to the defendant, or to introduce in evidence herein, the written consent of The Great Northern Railway Company to an assignment of the lease of June 22, 1908, to the United States Gypsum Company, and that it was too late for the plaintiff to deliver said consent; [154] all of which said reasons were supported by the arguments and authorities heretofore presented to this court.

2. The instrument deposited by the plaintiff herein purporting to be the written consent of The

Great Northern Railway Company to an assignment of the lease of June 22, 1908, to the United States Gypsum Company has not been properly identified or proved, and the defendant denies that the same was executed or delivered by the said The Great Northern Railway Company, or upon its behalf.

3. The plaintiff has not procured or delivered to the defendant the written consent of The Great Northern Railway Company to an assignment of the lease of June 22d, 1908, to the United States Gypsum Company, nor has it at any time heretofore tendered to the United States Gypsum Company any such written consent.

4. The said instrument purporting to be the written consent of said The Great Northern Railway Company to an assignment of the lease of June 22, 1908, to the United States Gypsum Company was not delivered to this defendant within the time that the said plaintiff was required to perform its contracts of June 15, 1909, July 1, 1910, and July 6, 1915, respectively.

5. The said instrument purporting to be the written consent of said The Great Northern Railway Company to an assignment of the lease of June 22, 1908, to the United States Gypsum Company does not purport to be supported by any consideration, and there was no consideration for said instrument.

6. At the time the said plaintiff filed its bill of complaint herein it had no cause of action against this defendant because:

(a) It had not procured or delivered to
[155] this defendant the written consent of

The Great Northern Railway Company to an assignment of said lease of June 22, 1908, to the United States Gypsum Company; and

(b) It had no right to convey or assign said lease of June 22, 1908, to the said United States Gypsum Company;

and it therefore follows that said suit was by the said plaintiff prematurely brought.

7. The said paper purporting to be the written consent of The Great Northern Railway Company to an assignment of said lease of June 22, 1908, to the United States Gypsum Company is insufficient in form because:

(a) It is not properly executed on behalf of The Great Northern Railway Company in that the authority of the person signing the same does not appear, nor does it appear that the execution and delivery of said instrument was authorized by the Board of Directors of said Railway Company, nor does it bear the corporate seal of the said The Great Northern Railway Company;

(b) It is not signed by the President or Secretary of the said corporation, The Great Northern Railway Company, nor is it acknowledged so as to entitle the same to record in accordance with the statutes of the State of Montana in such cases made and provided;

(c) It bears no date and it does not purport to be duly authorized by said The Great Northern Railway Company, a corporation;

and for these reasons the defendant says that the said instrument is insufficient in form to bind the said The Great Northern Railway Company or to constitute a sufficient consent to this defendant to an assignment of said lease by the said plaintiff. **[156]**

8. The indenture dated July 5th, 1916, and purporting to grant, bargain, sell, convey and confirm unto the United States Gypsum Company the premises described in said lease of June 22, 1908, does not purport to assign to the said United States Gypsum Company said lease of June 22, 1908, nor has the said plaintiff at any time heretofore tendered to the said United States Gypsum Company an assignment of said lease accompanied with the written consent of The Great Northern Railway Company to an assignment of said lease to the United States Gypsum Company, nor is said last-mentioned indenture dated July 5, 1916, accompanied by any such assignment, and it is now too late for the said plaintiff to tender the said last mentioned indenture or to tender an assignment of the said lease of June 22, 1908, to the United States Gypsum Company.

The defendant THEREFORE PRAYS that the motion of plaintiff for a decree in this case be denied, and that a decree be entered herein for the defendant.

Dated 4th day of September, A. D. 1917.

NORRIS & HURD,
SCOTT, BANCROFT, MARTIN, STEPHENS,
Solicitors for said Defendant.

(Duly verified by Mr. MacLeish.)

After argument of counsel the Court made the following statement and ruling: "I will take these papers and do something with it during the course of the day. I will not send a decree stating that you have obtained such consent because this document does not prove itself."

Mr. MACLEISH.—I should also like to call your Honor's attention, if your Honor intends to take the matter under advisement, that this decree provides for eight per cent interest from July 6, 1916, on the first $15,000.00, and then interest on the notes from that same date,—the date of payment. I should like to call your Honor's attention to the fact that at no time, even up to the present time, could the defendant have safely taken [157] possession of that property, and until plaintiff has performed there should be no interest charged against the defendant of any kind.

I assume whatever your Honor does, we may have our proper objections and exceptions placed on record.

THE COURT.—"That is to be considered. There are two phases to that case. As I say, again,—I don't know, I haven't read this notice, whether it makes it appear that they had the consent and could have given you a deed at the time performance was due, if you had called for it and raised that particular objection, which of course you don't do."

During the day of Sept. 4, 1917, the Court made an order deferring the making of decrees herein for a period of thirty days and made memorandum thereof.

On October 3, 1917, at Missoula, Montana, this matter came on for further hearing before the Court, Mr. Hoover appearing as solicitor for plaintiff and Mr. Hurd, solicitor for defendant.

Motion of Defendant for Suppression of Deposition of R. I. Farrington et al.

Defendant moved that the depositions of R. I. Farrington and L. E. Katzenbach heretofore taken at St. Paul, Minnesota, on September 25, 1917, in behalf of plaintiff be suppressed for the reasons stated in the motion of defendant which is as follows:

"Comes now the defendant, United States Gypsum Company, and moves the Court for an order suppressing the depositions of R. I. Farrington and L. E. Datzenbach heretofore taken by the plaintiff herein on the 25th day of August, 1917, at the city of St. Paul, State of Minnesota, on the ground and for the reason that said depositions and each of them were taken after the expiration of a period of [158] sixty days from the date whereon the above-entitled case was put at issue, and that said depositions were not taken in conformity with and pursuant to any of the provisions of the federal statutes or any of the provisions of the equity rules and taken in violation of rule forty-seven of the equity rules of practice.

This motion is based upon all the records, papers, files and minutes of court in said cause.

Dated this 3d day of October, 1917."

The COURT.—I will hear the depositions and if later it is found that they should not be admitted,

they will, of course, be considered.

Thereupon plaintiff offered the deposition of R. I. Farrington as follows:

Deposition of Robert I. Farrington, for Plaintiff.

My name is Robert I. Farrington. I am of the age of fifty-six years and a dealer in investment securities. I was a director and second vice-president of the Great Northern Railway Company throughout the month of June, 1909. I was elected a director of that company April 20th, 1901, and served continuously until May 27th, 1912. I was elected second vice-president December 30, 1901, when the company by its by-laws ceased to number the titles of vice-president, and thereafter I served as vice-president until December 31, 1912.

Q. As such officer was it a part of your duties to sign contracts and instruments affecting the title to the real property and right of way of the Railway Company?

Mr. HURD.—Defendant objects to this question on the ground that the testimony sought to be elicited by said question is incompetent for the purpose for which it is offered, that is to say, to prove the authority of the witness and that [159] such evidence is not the best evidence and no foundation is laid for it.

The COURT.—It appears that this objection was not made at the time the deposition was taken. I will hear the answer and if it appears the evidence is not admissible it will not be considered.

(Deposition of Robert I. Farrington.)

A. I had authority to sign such contracts and instruments.

Plaintiff's Exhibit "A" (consent of Railway Company set out at length on page 76) was handed to witness and he stated that I signed that instrument and that in signing same as second vice-president I was acting for the Great Northern Railway Company.

Q. Were instruments of this nature when so signed by you recognized by the corporation as valid acts?

Objected to by defendant upon the grounds last above stated that the same ruling of the Court was had thereon.

A. They were.

The first initials "W. W. B" upon the margin and upper left-hand corner of the exhibit "A" mentioned are those of W. W. Broughton who at the time was traffic manager of the Great Northern Railway Company, and the initials "C. H. B." are those of Charles H. Babcock who, I think, was the company's land commissioner at that time. The purpose of those initials were to indicate to me that in the opinion of those persons the instrument was a proper one for me to execute.

Deposition of L. E. Katzenbach, for Plaintiff.

The deposition of L. E. KATZENBACH was then read to the Court and is as follows:

My name is L. E. Katzenbach. I am thirty-seven years of age and I am secretary and treasurer of the

(Deposition of L. E. Katzenbach.)

Great Northern [160] Railway Company. I have been secretary since 1912. As such officer I have the custody of the corporate records of the company and the custody of the minute-book of the company. I have the minute-book of the meeting showing the election of R. I. Farrington to the office of director and to the office of vice-president of the Great Northern Railway Company. Witness produced a book which is volume two of the minutes of the stockholders and directors of the Great Northern Railway Company and read from the record the action taken by the board of directors of the Great Northern Railway Company on April 20th, 1901.

Q. Read the part with reference to the election of Mr. Farrington.

Objected to by Mr. Hurd for the reasons: First, that the testimony sought to be elicited by the question is not competent for any purpose; second, that it is not the best evidence; third, that there is no foundation for it, in that, the proper records of the Great Northern Railway Company are not shown to have been correctly kept and in that they have not been identified and defendant objects to all questions of similar purport and to all evidence of similar character on the grounds and for the reasons stated in such objection.

The COURT.—It appears this objection was not made at the time the deposition was taken. The same ruling.

A. On motion of Mr. James N. Hill, Mr. Robert I. Farrington was then elected a member of this board

(Deposition of L. E. Katzenbach.)

of directors of this company to fill the vacancy caused by Mr. Rod's resignation.

The minutes are properly attested by E. Sawyer, then assistant secretary of the company. This is the official and original record of the corporate action of the Great Northern [161] Railway Company. I know of no other record. I have checked through the minutes showing the re-election of Mr. Farrington as director from time to time and he continued as director of the company until May 27th, 1912. He was re-elected director October 11, 1906. All records of the company to which I have testified are properly attested and are the original meetings of stockholders of the company. I have the records of the corporation showing the election of Mr. Farrington as vice-president. (Witness produced them.) Mr. Robert I. Farrington was elected second vice-president of the company by the board of directors of the Great Northern Railway Company December 30, 1901. These are the original minutes and were attested by E. Sawyer, assistant secretary. The records show that Mr. Farrington was continuously in the office of second vice-president from December 30, 1901, to October 15, 1909. Thereafter and until in December, 1912, he was vice-president of the company. The minutes show that for the period including June, 1909, that Mr. Farrington was elected second vice-president of the company. These minutes are attested by E. Sawyer, assistant secretary, and the meeting was held on October 8, 1908. I have the by-laws of the company for throughout the

period when Mr. Farrington was an officer and director of the company. The provisions of the by-laws applicable to his duties are as follows:

Article VIII of the by-laws of the Company approved by the Board of Directors on July 24, 1896, reads as follows: "In addition to the officers prescribed and required by the charter of this Company, there may be a Second Vice-President and a Third Vice-President, who shall be elected by the Board of Directors in the same manner as is provided in Article I of these by-laws for the election of [162] Secretary and Treasurer, and who shall hold his office at the pleasure of the Board.

"The Board of Directors may invest the respective officers provided for in this Article with such powers and authority, and charge them respectively with such duties, not inconsistent with the charter of the Company nor with the laws of this State, as it shall deem proper and necessary in the due and orderly conduct and management of the business and affairs of the Company; and it will, by resolution, establish and clearly prescribe and define such powers, authority, and duties, and said officers will have, possess, and exercise all the authority and powers, and be charged with all the duties, thus established, defined and prescribed."

At a meeting of the Board of Directors held on October 27, 1903, Article III of the by-laws of the Company approved by the Board of Directors on July 24, 1896, above mentioned, was amended to read as follows:

"Article III.

"The President and Vice-President.

"Section 1. The President, or in his absence, the ranking Vice-President in attendance, who is also a director, shall preside at all meetings, either of the Board of Directors, or of the stockholders.

"In the absence from any meeting of the stockholders or Board, of the President and of all the Vice-Presidents who are directors, the stockholders or directors, as the case may be, may appoint a President *pro tempore.*

"Section 2. The President will have and exercise general supervision and control over the entire property, business and affairs of the Company.

"All the officers and agents of the corporation [163] will be responsible to him for the proper and faithful discharge of their several duties, and will obey such orders and make such reports to him touching the business of the Company under respective charge as he may from time to time direct; and any Superintendent, engineer, agent or employee of the Company may be suspended or discharged by him, if in his judgment there be cause for such suspension or discharge, at any time when the Board of Directors shall not be in session.

"All stock certificates and bonds, all leases, deeds and other instruments affecting the right of way, or other real property of the Company, all contracts with other railway companies relating to the use of railways or other real property with either party, and all other instruments having, or requiring to

(Deposition of L. E. Katzenbach.)

have, the Company's corporate seal affixed thereto, shall, to be valid, be signed by the President, or one of the Vice-Presidents who is also a director, or by one of the Vice-Presidents who is not also a director when especially authorized to do so by resolution of the Board, or by an Assistant to the President, when in like manner authorized to do so.

"The several Vice-Presidents shall perform such other duties as from time to time shall be directed by the President of the Board."

The quotations given are from the corporate records and the minutes of the Company. The minutes are duly attested. I have given the by-laws which affect the duties and authority of the second vice-president who was also a director during the time when Mr. Farrington was an officer of the Company. The removal of the word "second" from the title of Mr. Farrington as second vice-president did not in any way change his duties or authority as an officer of the company. I have [164] read all of the by-laws relative to the duties of Mr. Farrington as an officer and director of the company during the period he was in office. I know W. W. Broughton whose initials are placed upon exhibit "A" (the consent above mentioned). I do not know when Mr. Broughton left the employ of the company but I think it was in 1910 or 1911. It was before I severed my connection with the company, that is to say, prior to January, 1912. I do not know when Charles H. Babcock left the company but that was before my employment in the service of the company ceased.

(Deposition of L. E. Katzenbach.)

All the minutes from which I have read are contained in the official minute-book of the company. It is a part of my duties as secretary and treasurer of the company to have the custody and control of these books. The minutes of all the meetings referred to are attested by the secretary or the assistant secretary of the company. The minutes of the meeting of October 11, 1906, are attested by N. Terhune, assistant secretary. The minutes of the meeting of October 7, 1903, are attested by E. Sawyer, assistant secretary. I have appeared here pursuant to a subpoena *duces tecum.*

Cross-examination.

(By Mr. MACLEISH.)

Without waiver of objections made at the commencement of the taking of this deposition.

I have no personal knowledge of the records referred to by me consisting of resolutions and by-laws preceding the date of my employment. There are other by-laws of the corporation and amendments thereto touching the duties and authorities of vice-presidents which have not been read by me.

Q. Will you attach to your deposition the original of the by-laws of the corporation and the amendments thereto? Or hand them to the notary so that he may attach them? [165]

A. No, I won't.

Q. Will you attach to your deposition the original stockholders' resolutions and the original directors' resolutions, portions of which you have read in your direct examination? Or hand the same to the notary

(Deposition of L. E. Katzenbach.)

so that he may attach them? A. No.

The Great Northern Railway Company is incorporated under the laws of Minnesota.

Redirect Examination.

(By Mr. HOOVER.)

I am willing to read the entire original by-laws and entire original minutes of the stockholders and directors' meeting from which I have heretofore read parts and allow copies of such entire documents to be attached to my deposition.

Deposition of R. J. Reynolds, for Plaintiff.

R. J. REYNOLDS, a witness in behalf of plaintiff was called, duly sworn and testified in behalf of plaintiff as follows:

Mr. HURD.—To the evidence of the witness R. J. Reynolds the defendant objects on the ground and for the reason that there is no authority for the taking of said testimony because: First, the order and notice of the hearing to be held at this time does not specify that oral evidence will be offered; secondly, said defendant not having notice that any further testimony would be offered except that contained in the depositions is not prepared to meet such evidence.

The COURT.—The evidence will be admitted and if you are taken by surprise the Court will give you an opportunity [166] to present other evidence.

My name is R. J. Reynolds; I am an attorney at Great Falls, Montana. In the months of May and June, 1919, I was clerk in the legal department of the Great Northern Railway Company in the office

(Deposition of R. J. Reynolds.)

of Veazey & Veazey at Great Falls, Montana. They were division counsel for said Railway Company for the state of Montana and were at that time attorneys for the United States Gypsum Company in the matter of preparing lease and option between the Gypsum Company and the Mackey Wall Plaster Company, dated June 15, 1909. I am able to identify the instrument marked Plaintiff's Exhibit "A" (consent above referred to) attached to the deposition of R. I. Farrington. At the dictation of Mr. I. Parker Veazey, Sr., I prepared that consent.

Plaintiff's Exhibit "X" — Letter, June 8, 1909, Veazie & Veazie to Broughton, General Traffic Manager.

File 320.
June 8th, 1909.

Mr. W. W. Brougton,
General Traffic Manager,
St. Paul, Minn.

Dear Sir:

Referring to the subject discussed in your letter of May 28th, addressed to Mr. Kenney, with which you enclosed copy of letter addressed to you, under the date of May 26th, by Mr. S. L. Avery, President U. S. Gypsum Company, and copy of your reply (which said correspondence you asked to have brought to my attention, through Mr. Jackson) we herewith enclose written consent by the Railway Company to the sub-leasing and subsequent assignment of the lease from the Railway Company to the

(Deposition of R. J. Reynolds.)

Plaster Company, and would ask that you kindly have this paper immediately executed on behalf [167] of the Railway Company, and forward to Mr. S. L. Avery at Chicago, advising us of your having done so and, as Mr. Mackey may feel that he should have a similar instrument in the files of his company, we send the consent in duplicate and would ask if agreeable, you will have each of these instruments signed on behalf of the Railway Company and the other sent to the Mackey Wall Plaster Company at Great Falls.

Yours sincerely,

VEAZEY & VEAZEY.

IPV. R.

Q. State the circumstances under which it was prepared.

Mr. HURD.—To which question the defendant objects for the reason that it calls for a disclosure of privileged communication between attorney and client; that said evidence is not competent for any purpose and there is no foundation laid for it; and defendant objects to this entire line of testimony on the grounds stated in the last objection.

WITNESS.—I mailed the original and duplicate of the consent to Mr. W. W. Broughton, General Traffic Manager of the Great Northern Railway Company at St. Paul, Minnesota. Plaintiff's proposed Exhibit "X," which you hand me is an exact carbon copy of the letter with which the original and duplicate copy of the consent were inclosed. I wrote

(Deposition of R. J. Reynolds.)

that letter at the dictation of Mr. I. Parker Veazey, Sr., Mr. Veazey, Sr. signed the letter and I mailed it on June 8th, 1909. Whereupon, plaintiff's said proposed Exhibit "X" was offered in evidence.

I am able to identify plaintiff's proposed Exhibit "Y"; that is a letter received by Messrs. Veazey & Veazey from Mr. Broughton's office; it was received prior—probably a day or two—to the execution of the lease and option between the Mackey Wall Plaster Company and the United States Gypsum Company. [168] I received it from the mail and placed it upon Mr. I. Parker Veazey's table sometime during the day of its receipt. With the letter at the time it was received was enclosed the consent, Plaintiff's Exhibit "A." Whereupon said letter was offered in evidence as Plaintiff's Exhibit "Y."

Plaintiff's Exhibit "Y"—Letter, June 12, 1909, Broughton to Veazie & Veazie.

GREAT NORTHERN RAILWAY COMPANY.

W. W. BROUGHTON,
General Traffic Manager.

St. Paul, Minn. June 12, 1909.

Veazey & Veazey,
Attorneys, Great Falls, Mont.

Dear Sirs:

Referring to your letter of the 8th, file 320, enclosing consent of the railway company to the subleasing and subsequent assignment of lease from the railway company to the U. S. Gypsum Company.

I enclose, herewith, copy of this document duly

(Deposition of J. R. Reynolds.)

executed by the Great Northern Railway and have sent the other copy of the same to Mr. Avery, President of the Gypsum Company, at Chicago.

Yours truly,
W. W. BROUGHTON.

Cross-examination.

(By Mr. HURD.)

Messrs. Veazey & Veazey at that time were the attorneys for the United States Gypsum Company and were attorneys of that Company at the time the lease marked Plaintiff's Exhibit "X" was written.

Mr. HURD.—Defendant moves to strike all of the [169] testimony of witness R. J. Reynolds from the record upon the ground and for the reason that it discloses privileged communications between client and attorney and that no foundation for the testimony has been laid.

The COURT.—Same ruling as the first.

Deposition of W. H. Hoover, for Plaintiff.

W. H. HOOVER, a witness for plaintiff was called, sworn and testified as follows:

Mr. HURD.—Defendant objects to any testimony of the witness on the ground and for the same reasons stated to the testimony of Mr. Reynolds.

WITNESS.—My name is W. H. Hoover; I am an attorney at law, residing at Great Falls, Montana, and one of the attorneys for the plaintiff. Within three or four days after notice of the Court's findings of August 27th, 1917, I called at the office of Veazey

(Deposition of W. H. Hoover.)

& Veazey, attorneys for the Great Northern Railway Company at Great Falls, Montana. I then had a conversation with Mr. I. Parker Veazey, Jr., one of the members of the firm for the purpose of ascertaining whether the consent of the assignment of the lease in controversy had been given by the Great Northern Railway Company. After a conversation with Mr. Veazey, he went to his private files and produced a file concerning the matter between the United States Gypsum Company and the Mackey Wall Plaster Company. He produced from the file and handed to me the consent, Plaintiff's Exhibit "A," which is attached to Mr. Farrington's deposition, and stated that the consent had been given long prior to this time for the purpose of being delivered to the Mackey Wall Plaster Company and that he would then deliver it. The consent was pinned to the letter of Mr. W. W. Broughton, which has been introduced as Plaintiff's Exhibit "Y." I took the consent away with me. He later handed to me the two letters, Plaintiff's Exhibits "X" [170] and "Y" for the purpose of identifying the instruments. I later received a letter from the office of Mr. E. C. Lindley, Vice-president and General Counsel for the Great Northern Railway Company dated August 22d, 1917, which reads as follows, which I offer in evidence as Plaintiff's Exhibit "Z."

To which defendant objected upon the ground that the same was incompetent, irrelevant and that he had no authority to acquiesce in the consent theretofore given.

(Deposition of W. H. Hoover.)

Mr. HOOVER.—The plaintiff has heretofore tendered certain deeds and instruments to show compliance with its obligations under the contract. If there are any objections to the form or sufficiency of these instruments we would like to have it determined at this time so as to prevent delay.

Mr. HURD.—So far as I know the deeds are sufficient. At least I know of no objection upon that ground.

The plaintiff rested and Mr. Hurd for defendant stated that the defendant had no further testimony to offer. The court thereupon ordered decree in favor of plaintiff. By stipulation of counsel and with the consent of the Court the defendant was given until December 10th within which to prepare and file its bill of exceptions herein.

The foregoing is presented as a statement of the evidence taken on the trial of said cause.

SCOTT, BANCROFT, MARTIN &
STEPHENS and
NORRIS & HURD,
By EDWIN L. NORRIS,
Solicitors for Defendant.

Service of the above statement and receipt of a copy [171] thereof are hereby acknowledged and we hereby consent that the same be settled as a statement of the evidence in said cause.

Dated this 3rd day of December, 1917.

COOPER, STEPHENSON & HOOVER,
Solicitors for Plaintiff.

Order Approving Statement of Evidence.

The foregoing statement of the evidence contains all of the testimony, oral and documentary, introduced at the trial of said cause and is approved this the 3d day of December, 1917.

GEO. M. BOURQUIN,
Judge of the Above-entitled Court.

Filed Dec. 3d, 1917. Geo. W. Sproule, Clerk. [172]

That, on October 16, 1916, an order and opinion of the Court was duly filed herein, in the words and figures following, to wit:

In the United States District Court, in and for the District of Montana.

THE MACKEY WALL PLASTER COMPANY et al.,

Plaintiffs,

vs.

UNITED STATES GYPSUM COMPANY,

Defendant.

Memorandum Opinion.

Herein, the motion to dismiss the suit is denied as to the plaintiff corporation and granted as to the individual plaintiffs.

MEMO.

The complaint contains two separate causes of action, with no joint interest in plaintiffs.

Defendant's single motion is bad as to the plaintiff corporation, but plaintiffs, assert nothing by reason of it, and consent to dismissal as to the individual plaintiffs.

Filed October 16th, 1916. Geo. W. Sproule, Clerk. [173]

That, on July 27th, 1917, opinion of the Court was duly filed herein in the words and figures following, to wit: [174]

In the District Court of the United States for the District of Montana.

No. 78.

THE MACKEY WALL PLASTER COMPANY, a Corporation,

Plaintiff,

vs.

UNITED STATES GYPSUM COMPANY, a Corporation,

Defendant.

Opinion.

SPECIFIC PERFORMANCE.

It appears that by indenture plaintiff leased to defendant, all the former's "right, title, estate and interest," in and to certain mining and other property, the latter in part land plaintiff enjoyed under lease from a railway company subject to the usual condition of nonassignment and forfeiture for condition broken and of which defendant had notice.

The indenture contained an option to defendant to purchase during the term, and was twice renewed, the last renewal for one year. As additional consideration for the last renewal, defendant agreed that if it determined it would not exercise the option, it would timely give to plaintiff written notice "to the effect that lessee will not purchase," neglect or failure to give such notice obligating it to purchase. Defendant enjoyed the premises seven years, the term ending July 6th, 1916, notice of nonpurchase could be given at any time between July 6th, 1915 and May 3, 1916.

Plaintiff alleges defendant failed to give such notice, that plaintiff offered to perform, that defendant refused performance; and plaintiff offers to do equity. Defendant denies said failure to give notice and pleads waiver and estoppel in respect to notice, and that plaintiff cannot convey a good title nor any in respect to the railway [175] lease.

April 19th, 1916 defendant wrote plaintiff as follows:

[See Ex. 5—page 94.]

April 28th, 1916, a conference followed in defendant's office, between Mackey, plaintiff's president, and Knode, defendant's vice-president and manager, Nold defendant's superintendent, present. The evidence of this conference is as unsatisfactory as usual when oral passages solely between interested parties are relied upon by one of them to escape the obligation of a written contract by which he is otherwise bound, the other party resisting.

Defendant's, is the testimony of Knode and Nold,

in substance that they told Mackey conditions were adverse and that [176] defendant had decided not to purchase the property; that Mackey declared he would operate the property, then asked what defendant would do if it would not purchase; that Knode responded he would favor continuing the lease, whereupon Mackey requested such proposition be put in writing and sent to him, which Knode promised. Plaintiff's, is the testimony of Mackey, in substance that conditions were discussed; that Knode said that on May 4th or 5th defendant would send Mackey formal notice defendant would not purchase; that later, Knode said he would favor continuing the lease; and that Mackey responded that whatever defendant decided to do, to send to him at Great Falls.

May 11th, 1916, Knode wrote to Mackey, somewhat elaborately reciting that on April 19 he had written Mackey defendant would not purchase, that at the conference he had advised Mackey of defendant's decision not to purchase, that he wished to say defendant is unwilling to purchase the property, and briefly concluding defendant is willing to extend lease and option for an indefinite determinable term. May 12, 1916, and before receiving said letter, Mackey wrote defendant, assuming it had elected to purchase by failure to give notice otherwise. These and later letters seem obvious efforts to create self-serving documents.

The letter of April 19, is not notice to the effect the lessee would not purchase. Notice of rejection of an irrevocable offer, like notice of acceptance of

an offer, must be unequivocal and unambiguous. The reason and object are the same in both, viz., so that both parties are bound or both free, or neither is; so that subsequently neither can escape obligation of the contract or impose its obligation on the other, by belated construction of doubtful language. All doubts are resolved against the writer. The said letter is inconclusive. No prudent vendor would rely upon it and dispose of the property to another. The conditions the letter referred to the judgment of the writer might change. Men do not always [177] conform to future necessity. To say the writer expects to give formal notice of refusal to purchase, deprives the letter of all quality of the required notice, looks to the future, and advises that the writer has reason to consider it likely such notice will be given. It appears but tentative and for negotiation prior to the vital time, the day of decision. If it be conceded that this letter and defendants' version of the conference, if proven, make out the defense of waiver and estoppel, the proof fails.

He who alleges waiver and estoppel must clearly and satisfactorily prove all the necessary facts and elements. Mindful defendant's testimony is of two witnesses and plaintiff's, of but one, circumstances tend to establish at least equipoise between them. And so defendant has not sustained the burden of proof imposed upon it by its defense. It has not persuaded the court. Amongst the circumstances referred to is that the written contract requires written notice, that such notice was not given, the letter of April 19th looking to future notice, defendant's

business experience, common sense business methods, the responsibility of its witnesses, their embarrassment and defendant's liability.

Knodes mistake in dates and belief May 5th would suffice for notice, which mistake he admits, (Though immediately qualifiedly receding) he discovered about May 5th, when he "came to look and see," and the letter of May 11th, with its iteration and reiteration of notice as though to impress Mackey with its truth to save the situation, to escape the contract consequent upon neglect.

Mackey, too, lacked somewhat of being a satisfactory witness, but his testimony and the circumstances at least serve to defeat persuasion of waiver and estoppel, that sufficing for plaintiff's case.

The letter of May 11th, is too late. In this state time is of the essence of options upon mining property.

The contract is perhaps novel in real estate options [178] so far as the books disclose, but is analogous to sales on approval requiring notice of disapproval by a time limited. Notice failing, the sale is made or absolute. By mistake or neglect defendant failed to give notice. It agreed upon such contingency to purchase. No hardship is plead or proven, and nothing is perceived to move the discretion of a court of equity to withhold specific performance.

If are incumbrances for which plaintiff is responsible (none pointed out in a voluminous exhibit), purchase money deductions can be made in the decree. Plaintiff's offer of performance was without its railway landlord's consent to assignment of that lease.

Defendant did not base refusal to accept performance thereon, but on notice of rejection, waiver and estoppel.

Apparently when the contract was entered into, both parties contemplated either that plaintiff would secure such consent or that it was unnecessary; or defendant was willing to hazard it. Time was of the essence of defendant's rejection of purchase, but not of plaintiff's subsequent conveyance. For that, it had reasonable time.

This is not a case as defendant contends of lack of mutuality in that a stranger's (the railway lessor). consent is necessary and cannot be compelled; hence, since defendant could not have specific performance, plaintiff cannot.

It is the ordinary case of a contract to convey land which the vendor does not own—wherein he could not then perform his contract.

If able to perform when due, or at time of decree, no bad faith appearing, specific performance may be had.

Mutuality of remedy, not obligation, is alone required, and suffices if it exists at time of decree. This is now familiar law. The doctrine for which defendant contends applies where one party engages a stranger shall perform some service for the other party, and not where one party contracts to [179] convey what he does not own or but by defective title, incidentally involving that he procure a stranger to perform a service for him, the vendor, viz, convey the property to the vendor or perfect the vendor's title, so he may perform his contract with the vendee.

A contract to assign a lease involving the lessor's consent, is like in principle. Cases to the contrary are believed distinguishable or lack authority in this jurisdiction. This distinction is to be noted, however. Even if the contract be silent in respect to the landlord's consent, or though the vendee does not require it, there can be no specific performance without it. And that because a court of equity, of conscience, will not render a decree injuriously affecting parties not before it, will not render a decree for specific performance without it. And that because a court of equity, of conscience, will not render a decree injuriously affecting parties not before it, will not render a decree for specific performance which involves a party's breach of his contract with another. Otherwise would be the reverse of equity.

This court will not in effect decree the railway landlord must accept defendant as tenant for the term or invoke forfeiture of the lease. Nor will it by decree aid plaintiff to violate its covenant with its landlord. It is believed a landlord with right to determine its tenants, can have injunction to restrain assignment of such a lease.

If within thirty days plaintiff secures the railway lessor's consent to the assignment, or a discharge of the covenant, and in all else is ready and able to perform, it shall have decree as prayed. Otherwise, decree for defendant.

BOURQUIN,
Judge.

Filed July 27, 1917. Geo. W. Sproule, Clerk.
[180]

That, on September 5th, 1917, opinion of the Court was duly filed herein, in the words and figures following, to wit:

In the District Court of the United States, in and for the District of Montana.

MACKEY WALL PLASTER CO. et al.,
Plaintiffs,

vs.

UNITED STATES GYPSUM COMPANY,
Defendant.

Memorandum Opinion.

Herein, decree will be deferred thirty days.

MEMO.

Assignment of the lease can be done only with the Railway's written consent. Thirty days were allowed to procure that consent. The plaintiff presents such consent, (alleged) signed by one ———, 2d V. P. Defendant objects to sufficiency.

It does not appear that ——— is the officer he represents to be, and has authority to bind the railway company,—or that the railway company acquiesces in this consent. Under the circumstances plaintiff will be allowed to supply defects, if it can, within thirty days.

Title must meet the requirements of the law of specific performance, or not decreed.

BOURQUIN, J.

Filed September 5, 1917. Geo. W. Sproule, Clerk.

[181]

That, on September 19, 1917, notice of the taking of depositions was duly served herein, being in the words and figures following to wit:

In the District Court of the United States, in and for the District of Montana.

THE MACKEY WALL PLASTER COMPANY, a Corporation,

Plaintiff,

vs.

UNITED STATES GYPSUM COMPANY, a Corporation,

Defendant.

Notice of Taking of Depositions.

To the Above-named Defendant and to Messrs. Norris & Hurd, and Scott, Bancroft, Martin & Stephens, Its Solicitors,

You and each of you will please take notice that we will take the depositions of G. R. Martin, Charles H. Babcock, W. W. Broughton, James T. Maher, L. E. Katzenbach, R. I. Farrington, E. C. Lindley and W. P. Kenney, before Lewis D. Newman, a Notary Public, at Roon 1127 Great Northern Railway Building, 175 East Fourth Street, Saint Paul, Minnesota, upon Tuesday, the 25th day of September, A. D. 1917, at ten o'clock A. M., or at a time or times thereafter to which said hearing may be postponed or continued, when and where you may appear and propound interrogatories if you so desire.

Dated this 19th day of September, A. D. 1917.

COOPER, STEPHENSON & HOOVER,
Attorneys for Plaintiff.

Service of the within notice is admitted, this 19th day of September, A. D. 1917.

NORRIS & HURD, & SCOTT, BANCROFT, MARTIN & STEPHENS,
Attorneys for Defendant. [182]

That on September 17th, 1917, affidavit of W. H. Hoover supporting application to take depositions was duly filed herein, in the words and figures following, to wit: [183]

In the District Court of the United States for the District of Montana.

THE MACKEY WALL PLASTER COMPANY, a Corporation,
Plaintiff,

vs.

UNITED STATES GYPSUM COMPANY, a Corporation,
Defendant.

Affidavit of W. H. Hoover.

State of Montana,
County of Cascade,—ss.

W. H. Hoover being first duly sworn, deposes and says:

That he is one of the attorneys for the plaintiff

in the above-entitled action. That he makes this affidavit for the reason that no officer of the plaintiff corporation is within the state of Montana or county of Cascade where this affidavit is made; and for the further reason that he is personally well acquainted with the facts hereinafter particularly set forth, and is authorized to make this affidavit in behalf of plaintiff.

That pursuant to the decision in the above cause it has become necessary for plaintiff to offer proof showing that the consent of the Great Northern Railway Company to the assignment of the lease was properly authorized and given, and to make further showing pursuant to such order, and that a hearing is necessary for that purpose. [184]

That the consent tendered by the plaintiff in the above cause was executed by R. I. Farrington, as second vice-president of the Great Northern Railway Company.

That the offices of the Great Northern Railway Company, where the corporate books and records are kept, are located at Saint Paul, Minnesota. That the officers and agents of said corporation who are able to prove the said signature and *the* proper execution of said instrument reside and are now, to affiant's best knowledge, information and belief will continue to be in the city of Saint Paul in the State of Minnesota.

That G. R. Martin, Charles H. Babcock, W. W. Broughton, James T. Maher, L. E. Katzenbach, R. I. Farrington, E. C. Lindley, and W. P. Kenney, are witnesses, by whose testimony the genuineness of

the signature upon said consent and the authority of the officer to execute the same may be proved, and they are necessary witnesses in this case.

That each of the above-named witnesses lives at a greater distance than one hundred miles from Great Falls, Montana, where the hearing is to be had and the issue aforesaid tried.

That Lewis D. Newman is a notary public residing at Saint Paul, in the state of Minnesota, and having his office and place of business where it would be convenient for the testimony of all of the above-named witnesses to be taken.

That this affidavit is for the purpose of supporting and to be used in connection with the application for permission to take depositions hereto attached.

W. H. HOOVER.

Subscribed and sworn to before me this 17 day of September, A. D. 1917.

[Seal] GEO. W. SPROULE,
Clerk U. S. District Court, Dist. of Montana.

Filed Sept. 17, 1917. Geo. W. Sproule, Clerk.
[185]

That on September 17th, 1917, application for leave to take depositions was duly filed herein, in the words and figures following, to wit: [186]

In the District Court of the United States for the District of Montana.

THE MACKEY WALL PLASTER COMPANY, a Corporation,

Plaintiff,

vs.

UNITED STATES GYPSUM COMPANY, a Corporation,

Defendant.

Application for Permission to Take Depositions.

Comes now the plaintiff above named and applies to the Court for permission to take the depositions of G. R. Martin, Charles H. Babcock, W. W. Broughton, James T. Maher, L. E. Katzenbach, R. I. Farrington, E. C. Lindley and W. P. Kenney to be used at the hearing noticed for the 3d day of October, A. D. 1917, in the above cause, as evidence in behalf of plaintiff.

COOPER, STEPHENSON & HOOVER,
Attorneys for Plaintiff.

Filed Sept. 17, 1917. Geo. W. Sproule, Clerk. [187]

That on the 17th day of September, 1917, order permitting the taking of depositions was duly filed and entered herein in the words and figures following, to wit: [188]

In the District Court of the United States for the District of Montana.

THE MACKEY WALL PLASTER COMPANY, a Corporation,

Plaintiff,

vs.

UNITED STATES GYPSUM COMPANY, a Corporation,

Defendant.

Order Permitting the Taking of Depositions.

The application of the plaintiff in the above cause for permission to take depositions, having been presented to the Court, and the Court being advised.

IT IS HEREBY ORDERED

that the depositions of G. R. Martin, Charles H. Babcock, W. W. Broughton, James T. Maher, L. E. Katzenbach, R. I. Farrington, E. C. Lindley and W. P. Kenney, to be used before this court at the hearing noticed for the 3d day of October, A. D. 1917, may be taken, at any time prior to said hearing, before Lewis D. Newman, a notary public at St. Paul in the State of Minnesota; or, in case of his failure to act, then before a notary public at said place to be named in the notice of the taking of such depositions; and that notice of the time and place of

taking the said depositions must be given to the defendant or its attorneys five days previous to the time set for taking the same.

Dated this 17 day of September, A. D. 1917.

BOURQUIN,
Judge.

Filed Sept. 17, 1917. Geo. W. Sproule, Clerk.
[189]

Thereafter, on October 3d, 1917, Final Decree was duly rendered and entered herein, in the words and figures following to wit:

In the District Court of the United States in and for the District of Montana.

No. 78.

THE MACKEY WALL PLASTER COMPANY, a Corporation,

Plaintiff,

vs.

UNITED STATES GYPSUM COMPANY, a Corporation,

Defendant.

Decree.

This cause came on to be heard upon the 21st day of March, A. D. 1917, and proofs were heard and the cause submitted to the Court upon briefs of counsel; and

Thereupon upon July 27th, A. D. 1917, upon con-

sideration thereof, it was ordered, adjudged and decreed by the Court that if within thirty days plaintiff secure the consent of the Great Northern Railway Company to the assignment of the lease described in the amended complaint or a discharge of the covenant against assignment, plaintiff have its decree as prayed for. And such consent having been obtained by plaintiff and tendered in court within such time and the Court having heard proofs of its sufficiency and delivery and plaintiff having deposited in court deeds and conveyances as in said contract provided, and the Court being satisfied, it is hereby ORDERED, ADJUDGED and DECREED:

That the contract mentioned in plaintiff's amended complaint ought to be specifically enforced; and,

It is ORDERED, ADJUDGED and DECREED that defendant pay to plaintiff the sum of Fifteen Thousand Dollars ($15,000.00) **[190]** with interest at eight per cent per annum from July 6th, 1916, and execute and deliver to plaintiff its seven promissory notes for $5,000.00 each, dated July 6th, 1916, payable to the order of plaintiff and payable 3, 6, 9, 12, 15, 18 and 21 months after date respectively with interest upon each at five per cent per annum from date until paid; and it is

ORDERED that plaintiff do have and recover from defendant its costs and disbursements in this action.

Given and made this 3d day of October, 1917.

BOURQUIN, J.

Filed and entered Oct. 3, 1917. Geo. W. Sproule, Clerk. [191]

Thereafter, on December 3d, 1917, petition for appeal was duly filed herein, in the words and figures following, to wit. [192]

In the District Court of the United States, in and for the District of Montana.

No. —— IN EQUITY.

THE MACKEY WALL PLASTER COMPANY, a Corporation,

Plaintiff,

versus

UNITED STATES GYPSUM COMPANY, a Corporation,

Defendant.

Petition for Appeal.

To the Honorable GEORGE M. BOURQUIN, Judge of the Above-Entitled Court:

The above-named defendant feeling itself aggrieved by the decree made and entered in this cause on the 3d day of October, A. D. 1917, does hereby appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the assignment of errors, which is filed herewith, and it prays that its appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings

and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, California.

And your petitioner further prays that the proper order touching the security to be required of it to perfect its appeal be made, and petitioner further desiring to supersede the execution of the said decree, hereby tenders bond in such amount as the Court may require for the purposes **[193]** of this appeal, and of such supersedeas, and prays that with the allowance of the appeal and supersedeas be issued.

Dated this 3d day of December, 1917.

SCOTT, BANCROFT, MARTIN & STEPHENS,
EDWIN L. NORRIS and
GEORGE E. HURD,
Solicitors for Defendant and Solicitor.

Service of foregoing petition and receipt of copy thereof admitted Dec. 3, 1917.

COOPER, STEPHENSON & HOOVER,
Attys. for Plff.

Filed Dec. 3, 1917. Geo. W. Sproule, Clerk. **[194]**

Thereafter on December 3d, 1917, order allowing appeal and fixing bond was duly filed and entered herein, the words and figures following, to wit: [195]

In the District Court of the United States in and for the District of Montana.

No. ——IN EQUITY.

THE MACKEY WALL PLASTER COMPANY, a Corporation,

Plaintiff,

vs.

UNITED STATES GYPSUM COMPANY, a Corporation,

Defendant.

Order Allowing Appeal and Supersedeas and Fixing Bond.

On reading and filing the petition of the defendant herein for an order allowing appeal and supersedeas herein and the assignment of errors having been made and signed by the solicitors of the defendant and filed herein;

It is ordered that the said petition be granted and the said appeal and supersedeas be allowed upon the giving of a bond by the defendant in the sum of $ Twenty Thousand conditioned as required by law;

And it is further ordered that a transcript of the record and all proceedings had in said cause be

forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit;

And it is further ordered that the allowance of the said appeal shall operate as a supersedeas upon the filing by the defendant petitioner herein of a bond in the sum of $ Twenty Thousand, as aforesaid, with sufficient sureties to be conditioned as required by law and [196] which said supersedeas shall operate and be in full force and effect until the final determination of the said appeal by the United States Circuit Court of Appeals and until the further order of this Court.

Dated this 3d day of December, 1917.

GEO. M. BOURQUIN,
Judge.

Filed Dec. 3, 1917. Geo. W. Sproule, Clerk. [197]

Thereafter, on December 3d, 1917, assignment of errors was duly filed herein, in the words and figures following, to wit: [198]

In the District Court of the United States for the District of Montana.

No. ——IN EQUITY.

THE MACKEY WALL PLASTER COMPANY, a Corporation,

Plaintiff,

vs.

UNITED STATES GYPSUM COMPANY, a Corporation,

Defendant.

Assignment of Errors.

Now comes the United States Gypsum Company, a corporation, defendant in the above-entitled cause, and prays an appeal from the order and decree of the Court entered herein on the 3d day of October, A. D. 1917, and says that the said order and decree is erroneous and unjust to defendant because:

1. The Court erred in failing to hold that the complainant received from the defendant sufficient notice of the intention of the defendant not to purchase the properties of the Mackey Wall Plaster Company under the contracts of June 15, 1909, July 1, 1910 and July 6, 1915, respectively.

2. The Court erred in failing to hold that the letter of April 9, 1916, from defendant to complainant was sufficient notice to complainant of the intention of the United States Gypsum Company not to purchase the property of the Mackey Wall Plaster Company.

3. The Court erred in failing to hold that complainant, The Mackey Wall Plaster Company, waived notice of the intention of the United States Gypsum Company not to purchase the properties of the Mackey Wall Plaster Company, as required [199] by the contract of July 6th, 1915.

4. The Court erred in failing to hold that the complainant, The Mackey Wall Plaster Company, estopped itself from claiming, that it did not receive sufficient notice of the intention of the United States Gypsum Company not to purchase the properties of The Mackey Wall Plaster Company, as required by

the contract of July 6th, 1915.

5. The Court erred in failing to hold that the contract of June 15, 1909, and the extensions thereof on July 1, 1910 and July 6, 1915, respectively, could not be specifically enforced in equity at the suit of either the plaintiff or the defendant, and that said contracts were of such a nature, that they could not be specifically enforced in equity.

6. The Court erred in failing to hold that before complainant could maintain its cause of action against the defendant, it was necessary for the complainant to procure and deliver to the defendant the written consent of the Great Northern Railway Company to an assignment of the lease of June 22, 1908, to the United States Gypsum Company.

7. The Court erred in holding that complainant could procure said consent after the trial of said cause, and if it procured the same or a discharge of the covenant contained in said lease requiring such written consent, within thirty (30) days after the opinion was filed in said cause, the decree therein should be as prayed in complainant's said bill of complaint.

8. The Court erred in making order permitting taking of depositions of Robert I. Farrington and L. E. Katzenbach.

9. The Court erred in making order of September 4th, 1917, for a further hearing at Missoula on [200] October 3d, 1917, for the taking of further testimony.

10. The Court erred in overruling motion of defendant to suppress depositions of said Katzenbach

and Farrington and in admitting their depositions herein.

11. The Court erred in overruling objections of defendant to a question propounded to Robert I. Farrington, as follows: "As such officer was it a part of your duties to sign contracts and instruments affecting the title to the real property and right of way of the Railway Company?"

12. The Court erred in overruling objections of defendant to the following question set forth in the deposition of L. E. Katzenbach, to wit: "Read the part with reference to the election of Mr. Farrington."

13. The Court erred in holding that the consent procured by the complainant and filed herein was the written consent duly given by the Great Northern Railway Company and made and delivered by it as a consent to an assignment of said lease to the United States Gypsum Company.

14. The Court erred in receiving the instrument filed by the complainant herein and purporting to be the consent of the said Great Northern Railway Company to an assignment of said lease.

15. The Court erred in granting the motion of the complainant made herein on September 4, 1917, to enter a decree for complainant, based upon the presentation by the complainant of the said instrument purporting to be the consent of the Great Northern Railway Company to an assignment of said lease of June 22, 1908, to the United States Gypsum Company, and in denying the motion of the defendant made herein on September 4, 1917, to en-

ter a decree for said defendant.

16. The Court erred in allowing to the complainant [201] by its final decree in said cause interest on the sum of Fifteen Thousand Dollars ($15,000) at eight per cent (8%) per annum from July 6, 1916, and in allowing interest to said complainant by its final decree at five per cent (5%) per annum from July 6, 1916, upon the promissory notes mentioned in said decree.

17. The Court erred in providing in said decree that defendant pay the complainant the sum of money therein mentioned and execute the promissory notes therein described upon complainant executing a proper conveyance and delivering the written consent of The Great Northern Railway Company to the assignment of the lease of June 22, 1908, to the United States Gypsum Company.

18. The Court erred in entering its final decree in said cause in favor of the said complainant.

19. The Court erred in failing to enter a decree in said cause for the defendant, and in failing to dismiss the said bill of complaint for want of equity.

WHEREFORE, the defendant prays that the said order and decree be reversed and the District Court be directed to dismiss the bill of complaint.

SCOTT, BANCROFT, MARTIN &
STEPHENS and
EDWIN L. NORRIS and
GEORGE E. HURD.
Solicitors for Said Defendant.

Service of within Assignment of Errors admitted this 3d day of December, 1917.

COOPER, STEPHENSON & HOOVER,
Solicitors for Plaintiff.

Filed Dec. 3, 1917. Geo. W. Sproule, Clerk. [202]

Thereafter, on December 4th, 1917, bond on appeal was duly filed herein, in the words and figures following, to wit: [203]

In the District Court of the United States, in and for the District of Montana.

No. ———IN EQUITY.

THE MACKEY WALL PLASTER COMPANY, a Corporation,
Plaintiff,

versus

UNITED STATES GYPSUM COMPANY, a Corporation,
Defendant.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS: That we, United States Gypsum Company, a corporation, as principal and American Surety Company, as surety, acknowledge ourselves to be jointly and severally indebted to The Mackey Wall Plaster Company, a corporation, appellee in the above-entitled cause, in the sum of Twenty Thousand Dol-

lars, conditioned that, whereas, on the 3d day of October, 1917, in the District Court of the United States for the District of Montana, in an action pending in that court wherein The Mackey Wall Plaster Company, a corporation, was plaintiff and the United States Gypsum Company, a corporation, was defendant, numbered on the equity docket as ——, a decree was rendered against the said United States Gypsum Company and the said United States Gypsum Company having obtained an appeal to the Circuit Court of Appeals of the United States in and for the Ninth Circuit and filed a copy [204] thereof in the office of the clerk of the court to reverse the said decree and a citation directed to the said The Mackey Wall Plaster Company, citing and admonishing it to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden in the city of San Francisco, in the State of California, on the —— day of January, A. D. 1918 next.

Now, if the said United States Gypsum Company shall prosecute its appeal to effect and answer all damages and costs if it shall fail to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

UNITED STATES GYPSUM COMPANY.
By S. L. AVERY,
Prest.
S. T. MESERVING,
Secretary.
AMERICAN SURETY COMPANY.
By JOHN R. MAYBE,
Its Attorney in Fact.

Approved this 3d day of December, 1917.

WALKER & WALKER,
By THOMAS J. WALKER,
Attorney.

The above and foregoing Bond on Appeal is approved this 4th day of Dec., 1917.

BOURQUIN,
Judge of the Above-entitled Court.

Filed Dec. 4, 1917. Geo. W. Sproule, Clerk. **[205]**

Thereafter, on December 4th, 1917, Citation was duly issued herein, which said citation is hereto annexed and is in the words and figures following, to wit: **[206]**

In the District Court of the United States, in and for the District of Montana.

No. ———IN EQUITY.

THE MACKEY WALL PLASTER COMPANY, a Corporation,

Plaintiff,

versus

UNITED STATES GYPSUM COMPANY, a Corporation,

Defendant.

Citation on Appeal.

United States of America,
District of Montana,—ss.

The President of the United States to the Mackey Wall Plaster Company, a Corporation, and to Messrs. Cooper, Stephenson & Hoover, Its Solicitors:

You are hereby notified that in a certain case in equity in the United States District Court in and for the District of Montana, wherein The Mackey Wall Plaster Company, a corporation, is complainant, and the United States Gypsum Company, a corporation, is defendant, an appeal has been allowed the said defendant therein to the United States Circuit Court of Appeals for the Ninth Circuit.

You are hereby cited and admonished to be and appear in the said United States Circuit Court of Appeals at San Francisco, California, within 30 days after the date of this citation to show cause, if any there be, why the order and decree appealed from should not be [207] corrected and speedy justice done the parties in that behalf.

WITNESS the Honorable GEORGE M. BOURQUIN, Judge of the United States District Court for the District of Montana, this the 4th day of Dec., A. D. 1917.

BOURQUIN,
Judge of the District Court of the United States for the District of Montana.

Personal service of the foregoing citation upon us

and the receipt of a copy thereof on this the 3d day of December, 1917, are hereby acknowledged.

COOPER, STEPHENSON & HOOVER,
Solicitors for Complainant. **[208]**

[Endorsed]: No. 78. In the District Court of the United States in and for the District of Montana. The Mackey Wall Plaster Company, a Corporation, Plaintiff, vs. United States Gypsum Company, a Corporation, Defendant. Citation. Filed Dec. 4, 1917. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy. **[209]**

Thereafter, on December 3d, 1917, Praecipe for Transcript on Appeal was duly filed herein, in the words and figures following, to wit: **[210]**

In the District Court of the United States in and for the District of Montana.

No. ——IN EQUITY.

THE MACKEY WALL PLASTER COMPANY, a Corporation,

Plaintiff,

versus

UNITED STATES GYPSUM COMPANY, a Corporation,

Defendant.

Praecipe for Transcript on Appeal.

To the Clerk of the Above-entitled Court:

You will please incorporate into the transcript on

appeal in the above-entitled action the following portions of the record in said cause, to wit:

1. Complainant's amended complaint.
2. Defendant's answer to the amended complaint.
3. Plaintiff's reply to defendant's answer.
4. The statement of the evidence as settled by the judge of the above-entitled court.
5. The opinions of the Court rendered in said cause.
6. Notice of taking depositions of R. I. Farrington, L. E. Katzenbach, and others, at St. Paul, Minnesota, September 25, 1917.
7. Affidavit of W. H. Hoover supporting applications to take said depositions.
8. Application for permission to take said depositions. **[211]**
9. Order of Court permitting the taking of said depositions.
10. The final decree rendered and entered therein.
11. The petition on appeal.
12. The order allowing the appeal and supersedeas.
13. The assignment of errors.
14. The bond on appeal.
15. The citation on appeal and proof of service.
16. The clerk's certificate to transcript of record and the names and addresses of the solicitors of record.

Dated this 3d day of December, 1917.

SCOTT, BANCROFT, MARTIN & STEPHENS,

EDWIN L. NORRIS and
GEO. E. HURD,
Solicitors for Defendant.

Service upon us this the 3d day of December, 1917, at Great Falls, Montana, of a copy of the foregoing Praecipe indicating portions of the record to be incorporated into the transcript on appeal is hereby acknowledged by us.

COOPER, STEPHENSON & HOOVER,
Solicitors for Plaintiff.

Filed Dec. 3, 1917. Geo. W. Sproule, Clerk. [212]

Thereafter, on Dec. 31, 1917, order extending time to file record on appeal was duly entered herein, in the words and figures following, to wit:

In the District Court of the United States in and for the District of Montana.

THE MACKEY WALL PLASTER COMPANY, a Corporation,
Plaintiff,

vs.

UNITED STATES GYPSUM COMPANY, a Corporation,
Defendant.

Order Extending Time to and Including January 15, 1918, to File Transcript on Appeal.

Good cause having been shown to the Court, it is hereby ordered that the time for filing the transcript on appeal in the Circuit Court of Appeals is hereby extended to and inclusive of January 15th, 1918.

Dated this 31 day of December, 1917.

[Seal] BOURQUIN,
Judge.

Entered Dec. 31, 1917. C. R. Garlow, Clerk. [213]

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
District of Montana,—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 213 pages, numbered consecutively from 1 to 213, inclusive, is a full, true and correct transcript of the pleadings, orders, opinions of the court, and decree, and all other proceedings in said cause required to be incorporated in the record on appeal therein by the praecipe of the appellant for said record on appeal, including said praecipe, and of the whole thereof, as appears from the original records and

files of said court in my possession as such clerk; and I do further certify and return that I have annexed to said transcript and included within said pages the original citation issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of ninety-seven and 75/100 dollars ($97.75), and have been paid by the appellant.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said court at Helena, Montana, this 4th day of January, A. D. 1918.

[Seal] C. R. GARLOW,
Clerk. [214]

[Endorsed]: No. 3111. United States Circuit Court of Appeals for the Ninth Circuit. United States Gypsum Company, a Corporation, Appellant, vs. The Mackey Wall Plaster Company, a Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Montana.

Filed January 8, 1918.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.